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10

United States
Circuit Court of Appeals

For the Ninth Circuit.

**PIERRE BERCUT and JEAN BERCUT, Individually, and
as Copartners doing business as P & J CELLARS, a
Copartnership,**

Appellants,

vs.

PARK, BENZIGER & CO., INC., a Corporation,

Appellee.

and

PARK, BENZIGER & CO., INC., a Corporation,

Appellant,

vs.

**PIERRE BERCUT and JEAN BERCUT, Individually, and
as Copartners doing business as P & J CELLARS, a
Copartnership,**

Appellees.

Transcript of Record

In Two Volumes

VOLUME I


Pages 1 to 342

FILED

NOV - 6 1944

**PAUL P. O'BRIEN,
CLERK**

**Upon Appeals from the District Court of the
United States for the Northern District
of California, Southern Division.**



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**Upon Appeals from the District Court of the
United States for the Northern District
of California, Southern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court for the Northern District of California.

No. 22625 S

PARK, BENZIGER & CO., INC., a corporation,
Plaintiff,

vs.

PIERRE BER CUT and JEAN BER CUT, individually and as co-partners doing business as P & J Cellers, a co-partnership, FIRST DOE and SECOND DOE,

Defendants.

COMPLAINT

Now comes plaintiff and complains of defendants and for cause of action against them alleges:

I.

That this court has jurisdiction over this action because of the diversity of citizenship of the parties hereto.

II.

That at all the times herein mentioned, plaintiff Park, Benziger & Co., Inc. was and now is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, and authorized thereby to carry on the business of buying and selling wines at wholesale, with its principal place of business at No. 24 State Street, in the City of New York, State of New York, and

plaintiff is a resident and citizen of the State of New York.

III.

That at all the times herein mentioned, Serge Hermann, assignor of the plaintiff, was and now is a resident and citizen of the State of New York.

IV.

That at all the times herein mentioned, defendants [1*] Pierre Bercut and Jean Bercut, individually and as co-partners doing business as P & J Cellars, First Doe and Second Doe, and each of them, was and now is a resident and citizen of the City and County of San Francisco, State of California.

V.

That the matter in controversy exceeds the sum of Three thousand Dollars, exclusive of interest and costs.

VI.

That on or about the 29th day of January, 1943, at the City and County of San Francisco, State of California, defendants entered into a written agreement with Serge Hermann wherein and whereby defendants sold and said Serge Hermann purchased, approximately 60,000 cases of wine, produced and bottled by Fruit Industries, Inc. of the 1937-1938 vintage, consisting of dry wines of several types, such as claret, sauterne, Rhine wine, and burgundy, at \$5.25 per case, F.O.B. San Francisco,

*Page numbering appearing at foot of page of original certified Transcript of Record.

California, all Federal taxes paid, and sweet wines of several types, such as port and sherry at \$6.00 per case, F.O.B. San Francisco, California, all Federal taxes paid; that shipment was to be at the rate of one car minimum each month, to commence as soon as labels were affixed to the bottles of wine, and that payment was to be made upon the presentation of a sight draft with a bill of lading and invoice attached thereto.

VII.

That on or about the 25th day of February, 1943, Serge Hermann duly assigned said contract to Park, Benziger & Co., Inc., plaintiff herein, in writing for a valuable consideration and that plaintiff ever since has been and now is the assignee of the said contract dated on or about January 29, 1943, which said contract is more particularly referred to in Paragraph VI hereof. [2]

VIII.

That at all the times since the said 25th day of February, 1943, defendants ratified the said assignment to plaintiff and said defendants have corresponded and conferred with plaintiff concerning the preparation of labels for said wine, the preparation of equipment to affix said labels, the securing of approval from Federal Alcohol Tax Administration for the label, the obtaining of official opinion regarding shipment of said wine in interstate commerce, the preparation of cartons for the packaging

of said wine and other matters relating to the shipment of the wine referred to in said contract.

IX.

That at all times prior to the said assignment to plaintiff herein on or about the 25th day of February, 1943, Serge Hermann the assignor duly performed all the conditions of the said contract dated on or about the 29th day of January, 1943, on his part to be performed, and that since said assignment and at all times, plaintiff has fully performed all conditions thereof on the part of plaintiff to be performed.

X.

That on or about the 27th day of April, 1943, the defendants informed the plaintiff that said defendants would not perform the contract and would not ship and deliver to the plaintiff at any time or at all, the wine specified in said contract dated January 29, 1943, in accordance with the terms thereof, and that the said defendants and each of them totally repudiated the said contract and each and every part thereof.

XI.

That in reliance upon said contract, plaintiff has accepted an order for shipment of 1200 cases of said wines, the profit on which totals approximately \$1800.00; that in addition thereto, in reliance upon said contract, plaintiff [3] has secured the services of an artist and contracted for the printing of labels for said wines and has expended thereon approxi-

mately \$1000.00; that an officer of the plaintiff has travelled to arrange for packaging, labeling and shipping of said wines at an expense to plaintiff of approximately \$1500.00.

XII.

That by reason of the premises, plaintiff has advertised said wines for sale and has offered the said wines to numerous of its customers and has issued a price list to them thereon and as a result of defendants' breach is seriously damaged in its reputation with said customers and with the public, and plaintiff has been hindered and delayed in its business by said breach and has lost a great deal of time and business therefrom and by reason of the premises has been deprived of gains and profits which plaintiff otherwise would have acquired had it not been injured as aforesaid, to plaintiff's damage in the sum of \$237,750.00.

XIII.

That the true names of defendants sued herein as First Doe and Second Doe are not known to plaintiff, and plaintiff prays leave to amend this complaint by inserting herein the true names of said defendants together with appropriate allegations charging the same upon plaintiff's determining the true names of said defendants.

Wherefore plaintiff prays judgment against defendants and each of them in the sum of \$4300.00 as and for special damages and in the sum of \$237,-

750.00 as and for general damages, totalling \$242,050.00 plus interest thereon, costs of suit incurred therein and for such other and further relief as to the Court may seem proper in the premises.

ALFRED E. BRESLAUER

Attorney for Plaintiff

111 Sutter St.

San Francisco, Calif. [4]

State of California,

City and County of San Francisco—ss.

Philip Elman, being first duly sworn, deposes and says: That he is the vice-president of Park, Benziger & Co., Inc., a corporation, the above named plaintiff, and is authorized to make this verification for and on behalf of said corporation that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

PHILLIP ELMAN

Subscribed and sworn to before me this 8th day of May, 1943.

BERTHA RIESE ADLER

Notary Public in and for the City and County of
San Francisco, State of California

My Commission expires Sep. 11-1946

(Seal of the Notary)

[Endorsed]: Filed May 19, 1944. Walter B. Maling, Clerk. [5]

[Title of District Court and Cause.]

ANSWER

Now comes the defendants, Peter Bercut (sued herein as Pierre Bercut) and Jean Bercut, individually and as co-partners, doing business as P & J Cellars, a co-partnership, and answering the complaint on file herein, admit, deny and allege as follows:

I.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs I, II, III and V of said complaint and basing their denials on that ground deny generally and specifically, each and every, all and singular, the said allegations.

II.

Defendants deny generally and specifically, each and every, all and singular, the allegations of paragraphs VI, VII, VIII, IX and X of said complaint. [6]

III.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs XI, XII and XIII of said complaint and basing their denials on that ground, deny generally and specifically, each and every, all and singular the said allegations.

IV.

Defendants deny that plaintiff has been damaged in any sum, or in any amount, or at all, by reason of the matters or things set forth in said complaint.

As and for a separate, further and special defense herein, these answering defendants allege that the complaint on file herein fails to state a claim upon which relief can be granted.

Wherefore, these answering defendants pray that the complaint on file herein be dismissed; that defendants be given judgment for their costs of suit herein incurred and for such other and further relief as may be meet and proper in the premises.

Dated: June 8th, 1943.

LOUIS H. BROWNSTONE

Attorney for Defendants, Peter
Bercut and Jean Bercut, in-
dividually and as co-part-
ners, doing business as P &
J Cellars.

(Admission of Receipt of Copy)

[Endorsed]: Filed Jun. 8, 1943. Walter B.
Maling, Clerk. [7]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Now comes plaintiff and complains of defendants, and for cause of action against them alleges:

I.

That this court has jurisdiction over this action because of the diversity of citizenship of the parties hereto.

II.

That at all the times herein mentioned plaintiff, Park, Benziger & Co., Inc., was and now is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, and authorized thereby to carry on the business of buying and selling wines at wholesale, with its principal place of business at No. 24 State Street, in the City of New York, State of New York, and plaintiff is a resident and citizen of the State of New York.

III.

That at all the times herein mentioned, Louise Hermann, doing business as Chateau Montelena of New York, was and now is a resident and citizen of the State of New York, and Serge Hermann, agent of said Chateau Montelena of New York, was and now is a resident and citizen of the State of New York.

IV.

That at all times herein mentioned, defendants Pierre Bercut and Jean Bercut, individually and

as co-partners doing business as P & J Cellars, First Doe and Second Doe, and each of them, was and now is a resident and citizen of the City and County of San Francisco, State of California.

V.

That the matter in controversy exceeds the sum of Three Thousand Dollars, exclusive of interest and costs. [8]

VI.

That on or about the 29th day of January, 1943, at the City and County of San Francisco, State of California, defendants entered into a written agreement with Chateau Montelena of New York, represented by Serge Hermann, its duly authorized agent, a copy of which agreement is hereto attached marked Exhibit "A" and made a part hereof by reference and which said agreement was modified by a letter dated February 3, 1943, a copy of which said letter is hereto attached marked Exhibit "B" and made a part hereof by reference.

VII.

That on or about the 25th day of February, 1943 Chateau Montelena of New York duly assigned said contract to Park, Benziger & Co., Inc., plaintiff herein, in writing for a valuable consideration, and that plaintiff ever since has been and now is the assignee of the said contract dated on or about January 29, 1943, which said contract is more particularly referred to in Paragraph VI hereof.

VIII.

That at all the times since the said 25th day of February, 1943, defendants ratified the said assignment to plaintiff and said defendants have corresponded and conferred with plaintiff concerning the preparation of labels for said wine, the preparation of equipment to affix said labels, the securing of approval from Federal Alcohol Tax Administration for the label, the obtaining of official opinion regarding shipment of said wine in interstate commerce, the preparation of cartons for the packaging of said wine, and other matters relating to the shipment of the wine referred to in said contract.

IX.

That at all times prior to the said assignment to plaintiff herein on or about the 25th day of February, [9] 1943, Chateau Montelena of New York, the assignor, duly performed all the conditions of the said contract dated on or about the 29th day of January, 1943, on its part to be performed, and that since said assignment and at all times plaintiff has fully performed all conditions thereof on the part of plaintiff to be performed.

X.

That on or about the 27th day of April, 1943, the defendants informed the plaintiff that said defendants would not perform the contract and would not ship and deliver to the plaintiff at any time or at all, the wine specified in said contract dated Janu-

ary 29, 1943, in accordance with the terms thereof, and that the said defendants and each of them totally repudiated the said contract and each and every part thereof.

XI.

That in reliance upon said contract, plaintiff has accepted an order for shipment of 1200 cases of said wines, the profit on which totals approximately \$1,800.00; that in addition thereto, in reliance upon said contract, plaintiff has secured the services of an artist and contracted for the printing of labels for said wines and has expended thereon approximately \$1,000.00; that an officer of the plaintiff has traveled to arrange for packaging, labeling and shipping of said wines at an expense to plaintiff of approximately \$1,500.00.

XII.

That by reason of the premises, plaintiff has advertised said wines for sale and has offered the said wines to numerous of its customers and has issued a price list to them thereon, and as a result of defendants' breach is seriously damaged in its reputation with said customers and with the public, and plaintiff has been hindered and delayed in its business by said breach and has lost a great deal of time and business [10] therefrom, and by reason of the premises has been deprived of gains and profits which plaintiff otherwise would have acquired had it not been injured as aforesaid, to plaintiff's damage in the sum of \$237,750.00.

XIII.

That the true names of defendants sued herein as First Doe and Second Doe are not known to plaintiff, and plaintiff prays leave to amend this complaint by inserting herein the true names of said defendants together with appropriate allegations charging the same, upon plaintiff's determining the true names of said defendants.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of \$4,300.00 as and for special damages, and in the sum of \$237,750.00 as and for general damages, totaling \$242,050.00, plus interest thereon, costs of suit incurred herein, and for such other and further relief as to the Court may seem proper in the premises.

ALFRED F. BRESLAUER

Attorney for Plaintiff

111 Sutter Street, Suite 1333

San Francisco 4, California

[11]

State of California,

City and County of San Francisco—ss.

Alfred F. Breslauer, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on informa-

tion and belief, and that as to those matters he believes it to be true.

That affiant makes this verification in the place and stead of plaintiff in said action for the reason that the officers of plaintiff are absent from the City and County of San Francisco, State of California, where affiant has his office.

ALFRED F. BRESLAUER

Subscribed and sworn to before me this 26th day of July, 1943.

OLIVER LEUENBURG

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Jan. 3, 1947.

[Seal of Notary]

(Acknowledgment of receipt of copy) [12]

EXHIBIT "A"

AGREEMENT

This Agreement entered into this 29th day of January, 1943 by and between Pierre Bercut and Jean Bercut, doing business as a co-partnership, under the firm name and style of P & J Cellars, License No. 14-P-175 at 743 Market Street in the City and County of San Francisco, State of California, hereinafter referred to as party of the first part and Chateau Montelena of New York, License No. WW9 with offices at 48 West 48th Street in the City and State of New York herein represented by Serge

Hermann, its duly authorized special representative residing at No. 321 West 55th Street, Borough of Manhattan, City and State of New York party of the second part.

Witnesseth:

Whereas the party of the first part is the owner of certain stocks of wine of various kinds and vintage and

Whereas the party of the second part is desirous of purchasing said wines on an installment basis over a period of years.

Now, Therefore in consideration of the mutual promises and covenants herein contained, and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid, receipt of which is hereby acknowledged it is mutually agreed as follows:

First: The party of the second part hereby agrees to purchase approximately 60,000 cases of assorted bottled in California wines, part of which is at present bottled and stored and the balance to be bottled under terms and conditions to be mutually agreed upon.

Second: The party of the second part hereby agrees to take delivery of said wine at the rate of one carload each and every consecutive month hereafter for the next three years, the first carload to be taken during the month of [13] February 1943 and continue thereafter as stated up to the year 1945, with the understanding, however, that should the party of the second part desire additional quantities for holidays a maximum of two cars may be

shipped in a particular month, provided ample notice of such intention is given to the party of the first part.

Third: The quantities now bottled and stored may be stated approximately as follows:

Burgundy	7,167 cases of 12 bottles of fifths per case
Claret	7,145 cases of 12 bottles of fifths per case
Rhine Wine.....	6,587 cases of 12 bottles of fifths per case
Sauterne	4,095 cases of 12 bottles of fifths per case
Sherry	834 cases of 12 bottles of fifths per case
Port	763 cases of 12 bottles of fifths per case

and the price for this block of merchandise herewith mutually agreed upon to be paid to the first party by second party shall be as hereby stated and subject to the terms and conditions herein stipulated. During the year 1943 dry wines will be billed on the basis of Five Dollars and twenty-five cents (\$5.25) per case and the sweet wines at Six Dollars (\$6.00) per case. Prices F.O.B. San Francisco, California. During the year 1944 payment shall be made on the basis of Five Dollars and fifty cents (\$5.50) per case for dry wines and Six Dollars and twenty-five cents (\$6.25) per case for sweet wines F.O.B. San Francisco, California.

It is agreed that shipment of the above mentioned quantities will be made first and before any other commitments, and that the balance of the amount of the sale, which has not been bottled, is to be paid for proportionately between the parties hereto whereby increases or decreases due to changed con-

ditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945. [14]

Fourth: Second party hereby agrees that the assorted quantities bottled and stored have been sampled by him and are herewith accepted in entirety, and the party of the first part assumes no further liability as to the quality of the wines, but on quantities not yet bottled it is agreed that prior to acceptance, samples will be forwarded to the party of the second part for its approval, and in the event of non-approval nothing herein contained shall prevent party of the first part from disposing of such stocks through other channels should it so desire.

Fifth: That the manner of payment shall be by sight draft with Bill of Lading attached F.O.B. San Francisco, California drawn on second party for each shipment by car or steamer as the case may be.

Sixth: The party of the first part herewith stipulates that all taxes of any description levied upon said wines have been paid as of this date and second party herewith agrees to assume the payment of any and all taxes that may be levied upon said wines subsequent to the date hereof, by the Federal, State, Municipal or any other constituted authority.

Seventh: The party of the first part shall assume all storage charges on the stocks remaining

unshipped in San Francisco, and will carry sufficient insurance to protect the interests of both parties hereto, but in the event of destruction or damage to the stock due to fire, earthquake, acts of God, acts of war, the public enemy or any other causes beyond the control of party of the first part is clearly understood that the terms hereof shall be inoperative.

Eighth: The party of the second part shall supply at his own expense labels of his own choice to be affixed to the bottles, and shall also supply a special strip to be attached to each bottle of suitable design and appearance approved by the party of the first part with the inscription placed [15] thereon "Selected by Bercut Freres", and the party of the second part without allotment herewith agrees to conform to all the existing rules and regulations pertaining to labels and to any future legal aspects that may be formulated holding the party of the first part harmless from any and all controversies that may arise.

Ninth: The party of the first part hereby agrees to supply suitable cases for shipment out of San Francisco, said cartons to be in conformity with recognized practice in the shipment of wines to New York, but in the event of inability to secure standard cartons due to war conditions or priorities reserves the right of substitution to other cartons mutually considered to be of sufficient tensile strength for shipment to New York under normal conditions of handling by the carriers. The party

of the first part hereby agrees to furnish the labor for casing and affixing the labels and to deliver on cars or docks as desired in San Francisco.

Tenth: The party of the first part hereby grants unto second party the right to establish its own resale prices in all states, territories or for export.

Eleventh: The parties hereto mutually agree that the terms and conditions of this agreement shall be binding upon the heirs, executors, beneficiaries or successors in interests of both parties, and that in the event of any disagreement or conflict on interpretation respecting any of the provisions herein it is specifically agreed that the laws of the State of California shall govern and that should it be necessary to adjudicate any of the provisions herein such adjudication shall be submitted to a Court of competent jurisdiction in San Francisco, California. [16]

In Witness Whereof the parties hereto have set their hands this 29th day of January 1943.

P & J CELLARS

By PETER BERGUT

First Party

CHATEAU MONTELENA
OF NEW YORK

By SERGE HERMANN

Second Party [17]

EXHIBIT "B"

San Francisco, California,
February 3, 1943.

Chateau Montelena of New York,
48 West 48th Street,
New York City, N. Y.

Attention: Mr. Serge Hermann

Gentlemen:

With reference to our agreement executed on the 29th day of January 1943 the following revisions or additions are herewith made, said additional data to be included and to form part and parcel of the original agreement:

1. That the quantities stipulated as bottled as of this date are to the best of our knowledge vintage wines of 1937 and 1938.

2. That shipments of first car are to be made at such time as approval of labels can be secured and both parties are in a position to effect shipments, but the greatest diligence should be exercised by both parties in order to commence at least 60 days hence.

3. That the wines purchased have been produced and bottled by the California Wine Association and that an inscription bearing these words can be placed upon the labels.

All other terms and conditions are to remain without change and in full force and effect.

Very truly yours,

P & J CELLARS

By PETER BERECUT

WGE:HF

[Endorsed]: Filed Aug. 6, 1943. [18]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Now comes the defendants, Peter Bercut (sued herein as Pierre Bercut) and Jean Bercut, individually and as co-partners, doing business as P & J Cellars, a co-partnership, and answering the amended complaint on file herein, admit, deny and allege as follows:

First Defense

I.

Defendants are without knowledge or information, sufficient to form a belief as to the truth of the averments contained in paragraphs I, II, III, V and VII of said amended complaint.

II.

Defendants admit the execution of that certain agreement referred to in paragraph VI of said amended complaint, a copy of which is attached to said amended complaint and marked Exhibit A,

and admit the execution of the letter dated February 3, 1943, a copy of which is attached to said amended complaint and marked Exhibit B.

III.

Defendants deny generally and specifically, each and every, all and singular, the averments of paragraphs VIII, IX and X, of said amended complaint.

IV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs XI, XII and XIII of said amended complaint.

V.

Defendants deny that plaintiff has been damaged in any sum, or in any amount, or at all, by reason of the matters or things set forth in said amended complaint. [19]

Second Defense

The amended complaint on file herein fails to state a claim upon which relief can be granted.

Third Defense

Subsequent to the execution of the agreement attached to the amended complaint, marked Exhibit A, and of the letter modifying said agreement, marked Exhibit B, and on or about the 27th day of April, 1943, the said agreement, as modified, was terminated by mutual abandonment.

Fourth Defense

Neither plaintiff herein nor Chateau Montelena of New York, or both, ever had or now has the ability to perform the terms, provisions and conditions of the said agreement marked Exhibit A, as modified by the letter marked Exhibit B, required to be performed therein by Chateau Montelena of New York.

Fifth Defense

Neither plaintiff herein nor Chateau Montelena of New York, or both, ever had or now has the legal right to enter into and perform, or enter into or perform the said agreement marked Exhibit A, as modified by the letter marked Exhibit B.

Wherefore, these answering defendants pray that the amended complaint on file herein be dismissed; that defendants be given judgment for their costs of suit herein incurred and for such other and further relief as may be meet and proper in the premises.

LOUIS H. BROWNSTONE

Attorney for Defendants, Peter Bercut
and Jean Bercut, individually and as
co-partners, doing business as P & J
Cellars.

(Acknowledgment of receipt of copy)

[Endorsed]: Filed Aug. 12, 1943. [20]

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED INSTRUCTIONS

[21]

[Title of District Court and Cause.]

FURTHER INSTRUCTIONS REQUESTED
BY PLAINTIFF ON SECOND TRIAL

[22]

Plaintiff's Instruction No. 1

This is an action between Park Benziger & Co. Inc., a corporation, as plaintiff, and Pierre Bercut and Jean Bercut doing business as P & J Cellars, defendants. The action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The Plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendant's contract to sell and deliver 60,000 cases of wine.

Given ST. SURE, D J [23]

Plaintiff's Instruction No. 1-A

(If Instruction No. 1 is not given as is, respecting number of cases, plaintiff proposes the following alternative instruction:)

This is an action between Park-Benziger & Co., Inc., a corporation, as plaintiff and Pierre and Jean

Bercut doing business as P & J Cellars, defendants. The action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendants' contract to sell and deliver one car load a month during the years of 1943 and 1944 and one additional car per month during the holidays of said years if so desired by plaintiff.

Refused A. F. ST. SURE, D J [24]

Plaintiff's Instruction No. 2

The Court instructs you that the contract between Chateau Montelena of New York and the defendants, dated January 29, 1943, and modified by letter dated February 3, 1943, was a contract for the sale of merchandise in the ordinary course of business, the assignment thereof was not prohibited by statute nor by the contract itself, and that said contract was assignable.

Meyer v. Washington Times, 76 Fed. 2nd 988

La Rue v. Groezinger, 84 Cal. 281

Given ST. SURE, D J [25]

Plaintiff's Instruction No. 3

The Court instructs you that the assignment of a contract transfers to the assignee all of the right and title of the assignor in the contract, and the assignee is thereupon entitled to the performance of said contract.

You are instructed that the Chateau Montelena of New York assigned the contract dated January 29, 1943 between Chateau Montelena of New York and Pierre Bercut and Jean Bercut doing business as P & J Cellars, to the plaintiff, Park Benziger & Co., Inc., and that Park Benziger & Co. Inc., the plaintiff, was thereafter entitled to receive performance of the contract from the defendants.

Silva v. Providence Hospital of Oakland, 14
Cal. (2d) 762

Jones v. Albert, 161 Cal. 234

Given ST. SURE, D J [26]

Plaintiff's Instruction No. 4

You are instructed that after the contract in this case was executed between defendants, Pierre Bercut and Jean Bercut, doing business as P & J Cellars, on the one hand, and Chateau Montelena of New York on the other, the latter assigned its entire interest under said contract to the plaintiff herein, namely, Park Benziger & Co., Inc. It has been stipulated that defendants received notice of this assignment. You are instructed that after the defendants Pierre and Jean Bercut received notice

of this assignment no act or omission of the assignor could justify repudiation of the contract which from and after the date of the assignment was with plaintiff Park Benziger & Co., Inc.

Refused A. F. ST. SURE, D J [27]

Plaintiff's Instruction No. 5

You are instructed that Chateau Montelena of New York is not a party to this case. That any possible agreement which may have been referred to in the evidence under which plaintiff, after it took the assignment of the contract, may have agreed to pay part of its profits under said contract, to Chateau Montelena of New York, does not touch any issues in this case nor do the relations between plaintiff and Chateau Montelena of New York subsequent to the assignment of contract of plaintiff enter into this case; and you are to decide this case solely as between the plaintiff and defendants.

Russ v. Tuttle, 158 Cal. 226

Concordia Fire Ins. Co. v. Commercial Bank,
39 Fed. 2nd 826

Refused A. F. ST. SURE, D J [28]

Plaintiff's Instruction No. 5-A

You are instructed that Park-Benziger Co. Inc., a corporation, has no power to enter into a partnership with another person or corporation.

You are instructed that there was no partnership

between plaintiff Park-Benziger & Co. Inc., and Serge Hermann, or any one else.

New York General Corporation Law, Sec.
13, 14

6 Fletcher Cyclopaedia Corporation (Perm.
Ed.) pp. 243-4 Sec. 2520

Refused ST. SURE, D J [29]

Plaintiff's Instruction No. 5-B

To constitute a joint adventure, there must at least be (a) a community of interest in the object of the undertaking; (b) an equal right to direct and govern the conduct of each other with respect thereto; (c) share in the losses if any; (d) close and even fiduciary relationship between the parties.

Beck v. Cagle 46, Cal. App. 2nd 152, 161

Given ST. SURE, D J [30]

Plaintiff's Instruction No. 5-C

Transactions which one joint adventurer makes on his own behalf alone do not bind the other joint adventurers.

Given ST. SURE, D J [31]

Plaintiff's Instruction No. 5-D

Your are instructed that even though a joint-adventurer may abandon the enterprise for himself

he cannot abandon it for his co-adventurers without their consent.

30 Amer. Jurs. 702.

Goss v. Lanan, 152 N.W. 43, 46 Iowa

Zeibak v. Masser, 12 Cal. 2nd 1, 13

Refused A. F. ST. SURE, D J [32]

Plaintiff's Instruction No. 5-E

If by its terms the obligations of a written contract are expressly made binding upon successors and assigns of the parties thereto, no express assumption of those obligations by an assignee thereof is necessary.

3 Cal. Jur. 291

Brady v. Fowler, 45 Cal. App. 592, 595

Given ST. SURE, D J [33]

Plaintiff's Instruction No. 5-F

You are instructed that the law does not require an assignment to be in any particular form.

Given ST. SURE, D J [34]

Plaintiff's Instruction No. 6

The Court instructs you that when the assignor of a contract has performed or offered to perform all the requirements of said contract imposed upon him prior to the assignment, and that thereafter the assignee has performed or offered to perform all the requirements of said contract imposed upon him,

the assignee is entitled to performance of the contract from the other party.

If you find that the assignor Chateau Montelena of New York performed or offered to perform all the requirements of the contract of January 29, 1943, on its part prior to the assignment thereof, and that after said assignment, the plaintiff, Park Benziger & Co., Inc., performed or offered to perform on its part all the requirements of the contract dated January 29, 1943, you should find that the said plaintiff was entitled to performance from the defendants.

Civil Code, Section 1439

Given ST. SURE, D J [35]

Plaintiff's Instruction No. 7

You are instructed that if you find that the defendants repudiated their contract with plaintiff either by telling plaintiff that they would not perform or by acts inconsistent with defendants' continued performance of their obligations under the contract, then the plaintiff may sue immediately for breach of the contract.

Given ST. SURE, D J [36]

Plaintiff's Instruction No. 8

You are instructed that an offer of substantially different terms from those in the contract between the parties, stated with the intention not to perform the original contract, constitutes a repudiation of the contract by the party making said offer.

If you find that the defendants offered to plaintiff "three cars for cash" and other cars to be decided upon later, if at all, with the intention not to proceed with the original contract, you will find that the defendants repudiated and breached their contract with the plaintiff.

Given ST. SURE, D J [37]

Plaintiff's Instruction No. 9

The Court instructs you that when one party to a contract notifies the other party that he will not perform the obligations of the contract, this repudiation excuses further performance by the other party.

If you find that on or about the 27th day of April, 1943, the defendants repudiated the contract of January 29, 1943, and refused to perform said contract, you should find that the plaintiff was excused from further performance.

Civil Code, Section 1440.

Given ST. SURE, D J [38]

Plaintiff's Instruction No. 10

You are instructed that the defendants have raised the defense of plaintiff's alleged inability to pay for wine which the plaintiff purchased under the contract. You are instructed that the defendants were not justified in repudiating the contract unless the plaintiff were actually insolvent. The burden of proving such a defense is on the defendants. You are instructed that no evidence has been

offered tending to show that the plaintiff is or ever was insolvent. Mere doubts of the solvency of the other party afford no defense to the party who refuses to perform the contract according to its terms because of such suspicion.

3 Williston Rev. Ed. p. 2475

Given ST. SURE, D J [39]

Plaintiff's Instruction No. 11

You are instructed that defendants herein claim that the contract involved in this case was abandoned by mutual consent of the defendants and the plaintiff. You are instructed that abandonment is an affirmative defense and that the burden of proving the same by a preponderance of evidence rests upon the defendants.

If you do not find that the defendants have proved abandonment by the plaintiff by a preponderance of evidence or if you find that upon the issue of abandonment, the scales of proof hang even, then I instruct you to find against the defendants upon the issue of abandonment.

Given as modified ST. SURE, D J [40]

Plaintiff's Instruction No. 12

The defendants have alleged a termination of the contract by mutual abandonment. To constitute an abandonment of a contract there must exist on the part of all parties concerned an actual intent to abandon together with unequivocal, positive acts

inconsistent with continued performance of the contract,

If you find that there was no actual intent on the part of the plaintiff Park Benziger & Co., Inc., to abandon said contract of January 29, 1943, then you should find against the defendants on the alleged defense of mutual abandonment.

Utley v. Donaldson, 94 U. S. 29

City of Del Rio v. Ulen Contracting Co.,
94 Fed. 2nd 701

Peterson v. Wagner, 52 Cal. App. 1

Given ST. SURE, D J [41]

Plaintiff's Instruction No. 13

If you find that defendants Pierre Bercut and Jean Bercut, doing business as P & J Cellars, deliberately chose to take the written contract of Chateau Montelena shown on Defendants' Exhibit A, and not the written contract of two parties, then you are instructed that you must disregard all evidence tending to show that the instrument may have been intended to include any person other than the persons named therein.

Pac. Ready Cut Houses Inc. vs. Seober, 205
Cal. 690, 696

Ferguson v. McBean, 91 Cal. 63, 72

Refused A. F. ST. SURE, D J [42]

Plaintiff's Instruction No. 14

You are instructed that the agreement of April 27, 1943 (Def. Exhibit A), shows on its face that

Serge Hermann signed it on behalf of Chateau Montelena of New York. You are instructed that the contents of the document are conclusive and that it cannot be shown by oral evidence that Hermann signed on behalf of any one else.

Refused A. F. ST. SURE, D J [43]

Plaintiff's Instruction No. 15

The Court instructs you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on 60,000 cases of wine, and you find that said profit could reasonably have been expected, and if you find that said wines are unobtainable on the market, and if your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding \$237,750.00 as and for general damages.

Shoemaker v. Acker, 116 Cal. 239

Stephany v. Hunt Bros. Co., 62 Cal. App. 638

Robinson v. Rispin, 33 Cal. App. 536

Caspary v. Moore, 21 Cal. App. (2) 694.

Given as modified ST. SURE, D J [44]

Plaintiff's Instruction No. 15-A

(If instruction No. 15 is not given in the form requested as to the number of cases then the following instruction:)

The Court instructs you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on the wine which the defendants agreed to ship in the years 1943 and 1944, and you find that said profit could reasonably have been expected and if you find that said wines are unobtainable on the market, and if your verdict is for the plaintiff you will find general damages for the plaintiff in an amount not exceeding \$237,750.00.

Refused ST. SURE, D J [45]

Plaintiff's Instruction No. 16

You are instructed that when the seller of goods repudiates and fails to perform his contract prior to the delivery of said goods, and when said goods are generally available on the market, the measure of damages to the buyer is the difference between the contract price and the market value of said goods, at the times when they ought to have been delivered.

If you find that the plaintiff was damaged due to defendants' failure to perform the contract for sale of goods prior to delivery thereof, and that said goods are available on the market, then the plaintiff

is entitled to the difference between the contract price and the market price for 60,000 cases of wine as of the dates agreed upon for delivery, and you should find a verdict for the plaintiff in an amount not exceeding \$237,750.00, as and for general damages, the amount prayed for in the complaint.

U. S. Trading Co. v. Newmark, 56 Cal. App. 176, 191

Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567

California Civil Code, section 3300

Cal. Civ. Code Sec. 1787

Monaghan v. Alexander, 76 Utah 81, 287 Pac. 908 (Sales Act.)

Schopflocher v. Zimmerman, 240 N. Y. 507, 148 N. E. 660 (Sales Act, Cardozo, J.)

Segall v. Finlay, 245 N. Y. 61, 156 N. E. 97 (Sales Act.)

Refused A. F. ST. SURE, D J [46]

Plaintiff's Instruction No. 16-A

(If Instruction No. 16 is not given in the form requested as to the number of cases, then the following instruction:)

You are instructed that when the seller of goods repudiates and fails to perform his contract prior to the delivery of said goods, and when said goods are generally available on the market, the measure of damages to the buyer is the difference between the contract price and the market value of said

goods, at the times when they ought to have been delivered.

If you find that the plaintiff was damaged due to defendants' failure to perform the contract for sale of goods prior to delivery thereof, and that said goods are available on the market then the plaintiff is entitled to the difference between the contract price and the market price for the number of cases which defendants agreed to deliver during the years 1943 and 1944 as of the dates agreed upon for delivery, and you should find a verdict for the plaintiff in an amount not exceeding \$237,750.00 as and for general damages the amount prayed for in the complaint.

Refused ST. SURE, D J [47]

Plaintiff's Instruction No. 17

You are instructed that the jury in its discretion may award special damages arising from the breach of contract.

If you find for the plaintiff and you find that plaintiff has suffered special damages in the expenses incurred in reliance and performance of said contract, in failure to perform a contract for delivery of 1200 cases of wine specified in said contract, in hiring an artist to prepare labels and in manufacturing said labels, in trips of executives of said plaintiff from New York to California to arrange for shipments of the goods in reliance upon said contract, your verdict should be for the plaintiff in

the sum of not to exceed \$4300.00 as and for special damages.

Cole v. Swanston, 1 Cal. 51

Terrace Water Co. v. San Antonio Light and
Power Co., Cal. App. 511

Refused ST. SURE, D J

[Endorsed]: Filed Mar. 22, 1944. [48]

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED
BY DEFENDANTS [49]

Defense Request No. 1

The evidence shows that "Chateau Montelena of New York" was simply a business or trade name adopted or used by the wife of Serge Hermann in connection with the wine contract with the Bercuts, and that Serge Hermann had complete and entire charge of the business dealings under the name of Chateau Montelena of New York. I therefore instruct you that for the purposes of the present lawsuit you are to consider Serge Hermann and Chateau Montelena of New York as one and the same, and the act or conduct of either as the act or conduct of the other, and any mention of either in these instructions shall be deemed to include the other or both.

Given ST. SURE, D. J. [50]

Defense Request No. 2

The defendants Bercut admit that they did not deliver any of the wine mentioned in the contract, and they defend on the ground that the contract was cancelled or terminated by mutual abandonment on April 27, 1943.

Given ST. SURE, D. J. [51]

Defense Request No. 3

A contract can be mutually abandoned by the parties before performance begins or at any stage of their performance and each of the parties released from any further obligation on account of such contract. The contract may be abandoned by a written agreement or an oral agreement, or an agreement or understanding partly in writing and partly oral. The fact of such abandonment can be established by evidence of the acts and declarations of the parties. If you find that on or about the 26th and 27th days of April, 1943, Serge Hermann and plaintiff and the defendants herein mutually agreed to terminate or abandon the contract, Plaintiff's Exhibit No. 2, then, and in such event, your verdict should be for the defendants.

Tompkins x. Davidow, 27 Cal. App. 327, 335,
149 Pac. 789, 791, col. 2;

Guidery v. Green, 95 Cal. 630, 634, 30 Pac.
786;

Jones, Evidence, §442;

Bradley v. Bush, 11 Cal. App. 287, 293, 104
Pac. 845, 847, col. 2;

Morrow v. Coast Land Co., 29 C.A. 2d 92, 106-107, 84 Pac. 2d 301, 309, and cases there cited;

6 Cal. Jur. 382, §230.

Given ST. SURE, D J [52]

Defense Request No. 4

The inference of abandonment may arise either from a single act or from a series of acts. The question is whether there was an abandonment, not whether it is evidenced by one act or by many.

Morrow v. Coast Land Co., 29 C.A. 2d 92, 106-107, 84 Pac. 2d 301, 309.

Given ST. SURE, D J [53]

Defense Request No. 5

When a contract has been once mutually abandoned, it cannot thereafter be revived or restored to life by one of the parties alone because he changes his mind, even though the change of mind may occur in the next minute or hour or day after the mutual abandonment occurred. If you find from the evidence that the contract of January 29, 1943, was mutually abandoned at the moment that Serge Hermann signed and delivered the paper of April 27, 1943, then I instruct you that the contract could not be thereafter revived or restored to life without the assent or consent of the Bercuts, ~~and the evidence shows that the Bercuts never assented or consented to revival or restoration of the contract.~~

Given ST. SURE, D J [54]

Defense Request No. 6

The evidence shows that the paper of April 27, 1943, was signed only by Serge Hermann. You must therefore consider and determine the relationship between Serge Hermann and the plaintiff Park, Benziger & Co.

Given ST. SURE, D J [55]

Defense Request No. 7

The plaintiff Park, Benziger & Co. claims that Serge Hermann was merely employed by it as an employee or salesman working on a commission of 50% of net profits. The defendants Bercut claim that Park, Benziger & Co. and Serge Hermann were either partners or joint adventurers in the matter of the Bercut wine. If, as plaintiff claims, Serge Hermann was merely an employe or salesman, then Park, Benziger & Co. would not be bound by Hermann's act in signing the paper of April 27. However, if as the defendants Bercut claim, Hermann was either a partner of, or joint adventurer with, Park, Benziger & Co. in the matter of the Bercut wine, then you could infer from the whole of the evidence that Park, Benziger & Co. were bound by the act of Hermann in signing the paper of April 27.

Given ST. SURE, D J [56]

Defense Request No. 8

A partnership is an association of two or more persons to carry on as co-owners a business for profit.

Calif. Civil Code, §2400(1).

Given ST. SURE, D J [57]

Defense Request No. 9

A joint adventure is something like a partnership but is not identical with it. A joint adventure is an association of two or more persons or corporations to carry out a single business enterprise for profit. It is usually although not necessarily limited to a single transaction, although the business of conducting it to a successful termination may continue for a number of years. The name "joint adventurer" is applied to those special combinations of two or more persons or corporations, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation.

Elliott v. Murphy Timber Co., 117 Or. 387,

244 Pac. 91, 48 A.L.R. 1043, 1047;

33 C. J. 842;

Andrews v. Bush, 109 Cal. App. 511, 517-518,

293 Pac. 152, 154;

14 Cal. Jur. 760, §2.

Given ST. SURE, D J [58]

Defense Request No. 10

In considering whether or not a relationship such as that of joint adventurers or partners has been

created, the law is guided in part by the acts of the parties, and is not limited to their spoken or written words.

Andrews v. Bush, 109 Cal. App. 511, 517-518,
293 Pac. 152, 154.

Given St. SURE, D J [59]

Defense Request No. 11

In determining whether or not there was a joint adventure, you shall not fasten your attention upon any one paper or any one term of a paper or any one act alone to the exclusion of everything else. You should consider the whole scope of the arrangement and each part of it should be considered in relation to all other parts. Look at the arrangement as a whole.

Rosenblum v. Springfield Produce Brokerage Co., (Mass.) 137 N.E. 357, 360, col. 1;

Simpson v. Richmond Worsted Spinning Co., (Me.) 145 Atl. 250, 254, col. 1;

San Francisco Iron & Metal Co. v. American M. & I. Co., 115 Cal. App. 238, 245-247, 1 Pac.2d 1008, 1011.

Given ST. SURE, D J [60]

Defense Request No. 12

I further instruct you that in this lawsuit the question is not merely whether there was a joint adventure as between Serge Hermann and the plaintiff, but whether as between them on one side, and the defendants Bercut on the other, there

was one; and in such situation the relationship of joint adventurers may be determined by you from the apparent purposes and the acts and conduct of Hermann, Elman and Benziger, because the law says that the acts and conduct of parties may speak above their expressed declarations to the contrary.

O.K. Boiler and Welding Co. v. Minnetonka Lumber Co., (Okl.) 299 Pac. 1045, 1017-1018, approved in Universal Sales Corp. v. California Press Mfg. Co., 20 C.2d 751, 128 Pac.2d 665, 673-4.

Given ST. Sure, D J [61]

Defense Request No. 13

The use of the word "commission" in the paper of February 25, 1943, between Serge Hermann and Park, Benziger & Co. is of no importance. In the business world the words "commissions" and "profits" are often used as synonyms, and in any event the arrangement between them is not determined or controlled by any one word.

Van Tine c. Hilands, 131 Fed. 124, 127.

Refused A. F. ST. SURE, D J [62]

Defense Request No. 14

Of course, the wages or compensation of a mere employe or salesman may be measured by a percentage of the profits of a business,¹ but in determining whether there was a joint adventure it is important to inquire whether the person who renders or is to

¹Spier v. Lang, 4 Cal.2d 711, 53 Pac.2d 138;

render the services is himself the promoter or an original party to the enterprise. The evidence at bar shows that Serge Hermann was the promoter of the whole enterprise, and the original party to it, and you are therefore at liberty to infer that he was a joint adventurer² rather than a mere employe or salesman.

Given ST. Sure, D J [63]

²33 C. J. 844, §9;

Dexter & Carpenter v. Houston, 4 Cir., 20 F.2d 647.

Defense Request No. 15

Speaking generally, a partner or a joint adventurer contributes capital to the enterprise,¹ something promotive to the enterprise.² However, in the case of a joint adventure the contributions need not be the same in kind. It is sufficient if the contribution of one consists of time, energy, skill or experience, and it is sufficient in this respect if you find that Serge Hermann contributed his own time, energy, skill and experience in travelling from New York to California to look for wine, and subsequently to arrange for shipment, and was to have used his own time and energy, at his own expense,

¹Universal Sales Corp. v. Calif. Press Mfg. Co., 20 Cal.2d 751, 764, 128 P.2d 665, 673, col. 2.

²Simpson v. Richmond Worsted Spinning Co., 145 Atl. 250, 254, col. 1.

in finding buyers for the wine from Park, Benziger & Co.

Botsford v. Van Riper, 33 Nev. 156, 110
Pac. 705, 711;

Elliott v. Murphy Timber Co., 48 A.L.R. 1043,
1047;

Motter v. Smyth, 10 Cir., 77 F.2d 77, 79.

Refused A. F. ST. SURE, D J [64]

Defense Request No. 16

It is generally said that there must be a sharing of losses as well as profits as a test of a partnership or joint adventure. However, in the case of a joint adventure, the sharing of losses does not mean that each must bear the same kind of loss. One may lose money capital and the other may lose time and expenses. The evidence in this case shows that Serge Hermann travelled between New York and San Francisco a couple of times on his own time and at his own expense, and that that would have been his personal loss if no net profits were made. I therefore instruct you that that would be a sufficient sharing of loss to satisfy this branch of the question whether he was a joint adventurer instead of a mere employe or salesman on commission.

Shoemaker v. Davis, (Kan.) 73 Pac.2d 1043,
1045, col. 1;

Rae v. Cameron, (Mont.) 114 P.2d 1060,
1065, col. 1, quoting 30 Am. Jur. 682, §12.

Refused A. F. ST. SURE, D J [65]

Defense Request No. 17

The cancellation or termination writing or paper of April 27, 1943, is signed by defendants Bercut and by Serge Hermann for Chateau Montelena of New York, the same parties who were the parties to the original contract of January 29, 1943. If you find from the evidence that on April 27, 1943, when the writing or paper of that date was signed Serge Hermann was a partner or joint adventurer of or with the plaintiff Park, Benziger & Co., then I instruct you that under the circumstances of this case the plaintiff was bound by Serge Hermann's act and signature in signing on April 27, 1943, and your verdict should accordingly be in favor of defendants Bercut.

Bond v. O'Donnell, 63 A.L.R. 901, at 907;

Mahony v. Boenning, (Pa.) 6 Atl.2d 795;

Manatee Loan & Mortgage Co. v. Manley's
Estate, 106 Vt. 356, 175 Atl. 14, 17;

Mid-Columbia Production Credit Assn. v.
Smeed, (Or.) 136 Pac.2d 255.

Given ST. SURE, D J [66]

Defense Request No. 18

Each one of two or more joint adventurers has power to bind the others in matters within the scope of the joint enterprise, in dealings with third persons, and regardless of any limitations on authority that may have been agreed between the joint

adventurers, if the third person is unaware of the limitation of authority at the time of acting.

Manatee Loan & Mortgage Co. v. Manley's
Estate, 106 Vt. 356, 175 Atl. 14, 17.

Given ST. SURE, D J [67]

Defense Request No. 19

If you find that there was no partnership or joint adventure between Serge Hermann or Chateau Montelena of New York and plaintiff, but if you nevertheless find that Phillip Elman, Vice President of plaintiff, stated and represented to defendants on or about April 26th or April 27th, 1943, that such a partnership or joint adventure did exist, then, and in such event, plaintiff is bound by the termination agreement dated April 27, 1943, and your verdict should accordingly be for the defendants.

Withdrawn by Mr. Naus. [68]

Defense Request No. 20

Now, with respect to the occurrences on April 26 and 27 in 1943 one of two results is true: either the original contract of January 29, 1943, was cancelled or terminated by mutual abandonment when the paper of April 27, 1943, was signed and delivered, or else it was repudiated by the defendants Bercut. If you find that there was such a termination on April 27, then your verdict must be in favor of defendants Bercut, and there is no need for you to consider anything further. If you find that instead of such termination there was a repudiation of the

original contract, then your verdict should be in favor of plaintiff Park, Benziger & Co., and accordingly you would need to consider how to measure the amount of damages suffered by it.

Given ST. SURE, D J [69]

Defense Request No. 21

I will instruct you on the subject of the measure of damages because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on measuring damages and the fact that I give them to you must not be considered as intimating any views of my own on the issues of liability or as to which party is entitled to your verdict. It is for you to determine from the evidence whether the plaintiff was bound by the agreement of termination or cancellation dated April 27, 1943. If it was, your verdict should be in favor of defendants Bercut. If plaintiff was not bound, then you will be guided by the instructions as to how to measure the amount of plaintiff's damages.

Given ST. SURE, D J [70]

Defense Request No. 22

If you find that there was a repudiation of an uncanceled contract by the Bercuts, then upon the happening of the repudiation the plaintiff had a choice: it could either wait until the due date of each monthly delivery and treat each non-delivery as a separate breach and bring suit after the

breaches had actually occurred in fact, or it could choose to treat the repudiation as an immediate and anticipatory breach as to the whole of the 26,691 cases and bring suit at once without waiting for the due dates of future monthly deliveries to arrive. By bringing the present suit as it did, the plaintiff made the latter choice, treating the repudiation as one or a single immediate breach, that is, an anticipatory breach, as to the whole of the contract of 26,691 cases, as happening all at once on the one day of April 27, 1943, and I therefore instruct you that all damages are to be measured as of that day.

Lompoc Produce & Real Estate Co. v.

Browne, 41 Cal. App. 607, 183 Pac. 166;

Six Companies v. Joint Highway District,

311 U.S. 180, 85 L.Ed. 114 (duty of Federal courts to follow, in diversity of citizenship cases, the ruling of an intermediate appellate court of the State).

Refused A. F. ST. SURE, D J [71]

Defense Request No. 23

This suit being one for an alleged anticipatory breach by repudiation on April 27, 1943, your first inquiry, if you come to the question of damages, is whether as at April 27, 1943, the plaintiff could obtain from a responsible seller a substitute contract covering like wine on the identical terms, other than price, of the contract with the Bercuts, and if so at what prices?¹ If plaintiff could obtain

¹ *Roehm v. Horst*, 3 Cir., 91 Fed. 345, at 348 (bottom) and 349.

such a contract as of the breach date of April 27, 1943, at prices no greater than in the Bercut contract, it would not be damaged, but if the substitute contract required higher prices, then the damages would be the amount of their excess over the prices stated in the Bercut contract, without any regard to whether the spot market² in wine was either a falling or a rising market at any time after April 27, 1943, up to date.³

² *Lompoc Produce & Real Estate Co. v. Browne*, 41 Cal.App. 607, at 610 (and cases there cited), 183 Pac. 166 (delivery due Nov. 1; repudiation on Oct. 18; complaint filed Oct. 25; falling market; evidence of daily market prices after Oct. 18 excluded).

³ *Roehm v. Horst*, *supra*, and *s.c.*, on certiorari, 178 U.S. 1 at 21, 44 L.Ed. 953, 961, col. 2 (and see the statement of facts, 178 U.S. at 4, bottom, showing the proof of the "subcontracts for forward delivery" of the hops and measurement of the damages by the excess of the subcontracted prices over the prices of the breached contracts). The decisions in *Roehm v. Horst* are not cited as an applicable Federal rule, but as the local rule of California through adoption by citation and approval in the California case cited in note 2, next *supra*. The California rule is supported by the reasoning in such cases, e.g., as *Samuels v. E. F. Drew & Co.*, 2 Cir., 292 Fed. 734, 738, point 3, and *Crow & Dehn v. Chelan Packing Co.*, 158 Wash. 167, 290 Pac. 999. Accord, *Williams v. DeSoto Oil Co.*, 8 Cir., 213 Fed. 194, at 198, point 7; *Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 107 N.W. 1124; *Irving Trust Co. v. Compania Mexicana*, 2 Cir., 66 F.2d 390, 393, col. 2; *In re Susquehanna Silk Mills*, 10 F. Supp. 787, 788, point 1.

Defense Request No. 24

If a substitute contract was not immediately obtainable elsewhere by the plaintiff on the 27th day of April, 1943, then it was the duty of plaintiff to obtain one, if it was elsewhere obtainable, as quickly thereafter as was reasonably possible under the circumstances, and thereupon the damages would be the amount of the excess of the prices in such substitute contract over the prices stated in the Bercut contract.

Walter N. Kelly Co. v. Auto Body Co., 223
Mich. 613, 194 N.W. 518, 522-523.

Refused A. F. ST. SURE, D J [73]

Defense Request No. 25

If you find that a substitute contract for future deliveries was not obtainable elsewhere on April 27, 1943, or within a reasonable time thereafter, then the next question for you to consider is whether there was an available market in such wine for spot deliveries from time to time when deliveries would fall due under the Bercut contract.

Refused A. F. ST. SURE, D J [74]

Defense Request No. 26

When a buyer sues a seller of merchandise for damages for refusal to deliver the goods, the law uses one or the other, but not both, of two ways to measure the damages, depending on whether or not there is an available market for the goods in question.¹ Therefore, the first question to be considered

¹ Civil Code, §1787 (Uniform Sales Act, §67; Williston, Sales, §597);

is whether the wine was or was not available elsewhere in the market.² If available elsewhere in the nearest available³ market then the damages would be measured by the excess, if any, of the market value over the contract price. This is known as the market price, or market value, rule.

² 55 C. J. 1174, §1157, "Goods Unobtainable Elsewhere".

(The Sales Act, §67, as to measuring the buyer's damages for non-delivery of goods not obtainable elsewhere is merely declaratory of the rule in California before adoption of the Sales Act. See the following cases).

McKay v. Riley, 65 Cal. 623, 4 Pac. 667;

Rose v. Ford, 96 Cal. 152, 154, 30 Pac. 1114;

National Oil Refining Co. v. Producer's Refining Co., 169 Cal. 740, 147 Pac. 963;

Western Industries Co. v. Mason, etc. Co., 56 Cal. App. 355, 205 Pac. 466;

Coates v. Lake View Oil & Refining Co., 20 C.A.2d 113, 66 Pac.2d 463.

³ Williston, Sales, §599.

Refused A. F. ST. SURE, D J [75]

Defense Request No. 27

The measurement of damages under the market price or market value rule occurs only when there is in fact an available market at the time of the breach. Obviously, there must be an available market.¹ Market price implies the existence of a market, of supply and demand, of sellers and buyers.² The term

¹ Weed v. Lyons Petroleum Co., 294 Fed. 725, 734.

² Heiner v. Crosby, 3 Cir., 24 F.2d 191, 193.

“market value”, as the words fairly import, indicates price established in a market where the article is dealt in by such a multitude of persons, and such a large number of transactions, as to standardize the price; individual dealings are not competent to prove it.³ A casual sale does not establish a market.⁴ Market price is not an imaginary fictitious thing, but is the price at which goods are actually being sold in the market at the time or times in question.⁵

³ *North American Tel. Co. v. Northern Pacific Ry. Co.*, 8 Cir., 254 Fed. 417, 418.

⁴ *Le Blume Import Co. v. Coty*, 2 Cir., 293 Fed. 344, 351.

⁵ *Birdsong & Co. v. Marty*, 163 Wis. 516, 158 N.W. 289, 292, col. 1 (decided under Uniform Sales Act, §67).

Refused A. F. ST. SURE, D J [76]

Defense Request No. 28

I instruct you that the evidence before you is insufficient to show that the goods were obtainable elsewhere, that is, it is insufficient to show an available market. On the contrary, it shows no available market. Accordingly, we must turn to the other rule for measuring the damages, and the rule in such case is that the measure of the buyer's damages is the loss directly and naturally resulting in the ordinary course of events from a seller's breach of contract,¹ which rule as specifically applied to this case now before you means that, if you find there was a

¹ Civil Code, §1787(2).

breach, either (1) the amount of the buyer's outlay of expenses in the course of preparing to carry out the contract before he knew that the seller would not perform, or (2) the net profits, if any, that the buyer was reasonably certain to have made if the seller had performed the contract.

Given ST. SURE, D J [77]

Defense Request No. 29

The amount of outlay cannot be awarded to a buyer in any case in which profits are awarded to him, for the sound reason that expenses incurred by him in his preparation for performance before he knew that the seller would not perform are simply the buyer's own expenses incurred in the hope or expectation of making profit and are included in any calculation of his profit, if any. To award a buyer the amount of both outlay and profits would amount to a "double recovery" by him,¹ making the seller "pay twice for the same thing",² which the law does not permit and which you should not do. The two heads of damage are distinct.³

¹ *Holt v. United Security Life Ins. & Trust Co.*, 76 N.J. Law 585, 72 Atl. 301, at 307, col. 2, 21 L.R.A. N.S. 691;

Feldman v. Jacob Brantman & Son, (N.J.) 166 Atl. 126, 128, col. 2 (under Uniform Sales Act, §67).

² *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 546, 47 L.Ed. 1171, 1174, col. 2, top.

³ *U. S. v. Behan*, 110 U.S. 338, 345, 28 L.Ed. 168, 170, col. 2.

Refused A. F. ST. SURE, D J [78]

Defense Request No. 30

In paragraph XI of its amended complaint the plaintiff claims that it expended \$1,000.00 for the services of an artist and a printer in preparing labels for the bottles, and \$1,500.00 for the traveling expenses of one of its officers in the course of arranging for the labelling, packaging and shipping of the wine. Such expenses are known as "outlay"¹ and in nature are expenses incurred in preparing to perform the contract.² Such outlay may be awarded to a buyer as damages if he fails to prove with reasonable certainty a loss of net profits.²

¹ Cederberg v. Robison, 100 Cal. 93, 97, 34 Pac. 625, 626, col. 1;

U. S. v. Behan, 110 U.S. 338, 28 L.Ed. 168.

² U. S. v. Behan, *supra*.

Refused A. F. ST. SURE, D J [79]

Defense Request No. 31

Now, even though the law lays down the rule that in case of a seller's breach of an obligation to deliver goods not obtainable elsewhere the buyer's damages may be measured by his loss of profits, nevertheless the buyer must make proof showing that it was reasonably certain that the profits would have been made. Guesswork or conjecture or speculation cannot be used as a substitute for proof.¹

¹ U. S. v. Behan, 110 U. S. 338, 344, 28 L. Ed. 168, 170, col. 2.

That is not peculiar to the law of sales alone, but is applicable to all civil actions for damages for breach of contract. Not only must the plaintiff prove the breach, but he must also prove the damages by a sufficiency of evidence as distinguished from guesswork or conjecture.²

² *Iron City Toolworks v. Welisch*, 3 Cir., 128 Fed. 693, 695-696;

Gibson v. Hercules Mfg. & Sales Co., 80 Cal. App. 689, 702-704, 252 Pac. 780, 785;

Johnson v. Hislop, 9 Cir., 272 Fed. 913, and quotations at page 915.

Given ST. SURE, D J [80]

Defense Request No. 32

If you find from the evidence that plaintiff Park, Benziger & Co. was embarking or starting in a new venture in the matter of California wine, that is, were seeking to launch a new enterprise, and that they have not proved to your satisfaction that they can show, as a means of measurement, past profits in substantial dealing in California wine under their label and through their past experience, if they had any, in such dealing in California wine, then I instruct you that you should not, and the law says you cannot, award them anything for supposed loss of anticipated profits, because the fact of profits to be realized from a business about to be launched can exist only on paper and while profits may be possible, losses in the enterprise are just as pos-

sible, and in either case they are nothing more than contingent probabilities, and of too uncertain a character to constitute a basis for the computation of damages for the breach.¹ The rule is the same regardless of whether the plaintiff had not previously conducted the business at all, or whether an established liquor business was simply adding a new line of merchandise, such as adding a new line of California wine.²

¹ *Gibson v. Hercules Mfg. & Sales Co.*, 80 Cal. App. 689, 702, 252 Pac. 780, 785, and cases;

Note, 32 A.L.R. 120, at 153-156;

8 Cal. Jur. 777, §38;

Central Coal & Coke Co. v. Hartman, 8 Cir., 111 Fed. 96, 98-99

Iron City Toolworks v. Welisch, 3 Cir., 128 Fed. 693, 695-696.

California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, at 485 (and cases there cited), 221 Pac. 345, 347, 32 A.L.R. 114, 117-118 (distinguished in *Natural Soda Products Co. v. Los Angeles*, 23 A.C. 190, 143 Pac. 2d 12, 17);

Terre Haute Brewing Co. v. Dwyer, 8 Cir., 116 F. 2d 239, 242, Col. 2.

² *Thrift Wholesale Inc. v. Malkmillion Corp.*, 50 F. Supp. 998, and cases at 1000.

Refused A. F. ST. SURE, D J [81]

Defense Request No. 33

Not only should a jury refrain from speculating, conjecturing or guessing about net profits in the absence of evidence from which an inference of

profit may be reasonably drawn with reasonable certainty, but it is equally true that a jury should not accept the guess or estimate or opinion of any witness upon the subject, even though given or stated under oath on the witness stand, when it has no better basis in proved facts. The speculations, conjectures, guesses or estimates of witnesses not based upon facts from which reasonably accurate inferences may be drawn form no better basis for a verdict than guesses or conjectures by the members of the jury themselves.

Central Coal & Coke Co. v. Hartman, 8 Cir.,
111 Fed. 96, 102.

Refused A. F. ST. SURE, D J [82]

Defense Request No. 34

I further instruct you that even though lost profits be proved with reasonable certainty, nevertheless you must not award them unless you find from the evidence that on the 29th day of January, 1943, at the time the contract was entered into, the defendants Bercut then knew that if they did not thereafter deliver the wine it could not be obtained elsewhere; and if at the time of entering into the contract they did not have that knowledge, it is immaterial whether either or both of the Bercuts thereafter, and before non-delivery or refusal to deliver, learned or knew that the wine could not be obtained elsewhere. The only award of damages permitted

by the law for breach of a contract of sale by a seller are such damages as may be fairly said to have been known at the time of contracting to be the probable result of a breach of contract by the seller, which requires the existence and proof of the fact that at the time of contracting the seller knew that the goods could not be thereafter procured elsewhere in the market.

Marcus & Co. v. K. L. G. Baking Co. (N. J., 1939) 3 Atl. 2d 627, 631-632 (under Sales Act, §67, i.e., Calif. Civil Code, §1787);

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 47 L. Ed. 1171;

Williston, Contracts, §§1355-1357;

See Czarnikow-Rionda Co. v. Federal Sugar Refining Co., 255 N.Y. 33, 173 N.E. 913, 88 A.L.R. 1426, and note, 1439.

Refused A. F. ST. SURE, D J [83]

Defense Request No. 35

The term "profits", as I have used it in these instructions, does not mean gross profits. "Gross profits" are really not profits at all within the contemplation of the law, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. If a buyer is entitled to an award at all because of loss of profits, the award must be confined to net profits. "Net profits" are the gains from sales after deducting the expenses

of doing business, together with the interest on the capital employed.¹ ~~In addition to those deductions you must also deduct the 50% selling commission~~ which was to have been paid by the plaintiff to Serge Hermann because that would be clearly a selling expense² of the plaintiff if Serge Hermann were only an employe or salesman on commission instead of a partner or joint adventurer.

¹ Coates v. Lake View Oil & Refining Co., 20 C.A. 2d 113, 119, 66 Pac. 2d 463, 466;

Terre Haute Brewing Co. v. Dwyer, 8 Cir., 116 F. 2d 239, 242, col. 2.

² Klingman & Scoular v. Racine-Sattley Co., 149 Iowa 634, 128 N.W. 1109, 1110, col. 2 (bottom) and 1103, col. 1;

C. W. Rantoul Co. v. Claremont Paper Co., 1 Cir., 196 Fed. 305, 309;

Detroit Fireproofing Tile Co. v. Vinton Co., 190 Mich. 275, 157 N.W. 8, 10, col. 1.

Given as modified ST. SURE, D J [84]

Defense Request No. 36

In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to determine net profits, I instruct you that you cannot in any event use a greater markup by plaintiff over the cost to it than the markup permitted under OPA regulations as a price ceiling; and the burden of proof¹ is on the plaintiff.

¹ Davis v. Carnegie Steel Co., 6 Cir., 244 Fed. 931, 934;

Molyneaux v. Twin Falls Canal Co., (Idaho) 94 A.L.R. 1264, 1277, 35 Pac. 2d 651, 659.

Given ST. SURE, D J [85]

Defense Request No. 37

I further instruct you that you must consider the fact that because no wine was delivered under the contract to the plaintiff it follows that the plaintiff was relieved from business hazard and responsibility in handling and disposing of the wine over a period of years, and was freed from any risks involved, and from time and trouble. From the award, if you make any, to the plaintiff, you should make a reasonable deduction from any arithmetical or calculated amount of net profits, because of that release and freedom from risk, hazard and responsibility, and saving from expenditure of time, trouble and energy over the period of time originally contemplated for completion of delivery in monthly installments.¹ The amount of such deduction is not fixed in any particular percentage by the law which leaves it to the good sense and wisdom of an intelligent jury.

¹ Floyd and Speed v. United States, 2 Ct. Cl. 429, 441, affirmed in United States v. Speed, 8 Wall. (75 U. S.) 77, last two paragraphs (leading case)

Buchholz v. Green Bros. Co., 272 Mass. 49, 172 N.E. 101, 103, col. 1, points 5 and 6.

Refused A. F. St. SURE, D J [86]

Defense Request No. 38

Although the agreement dated January 29, 1943, purports to be for the sale of 60,000 cases of wine,

a price is fixed for only 26,691 cases and the price for the remainder of 33,309 cases was left to be determined by future negotiations which never took place. Under such circumstances the contract must be treated as one for the sale of only 26,691 cases. If you find that plaintiff is entitled to recover, you will ascertain the damages, if any, suffered by him on the basis of a contract for the sale of only 26,691 cases of wine.

Given ST. SURE, D J [87]

Defense Request No. 39

In the instructions I have given you thus far I have given you the general rules for measuring damages. I further instruct you, however, that a buyer who claims damages from a seller for non-delivery of the goods is always under a duty to minimize or mitigate his damages, that is, to keep them down if reasonably possible. There is conflicting testimony before you as to the amount of wine offered by Jean Bercut to plaintiff immediately after the cancellation agreement of April 27, 1943, was signed and delivered. If you find that he then offered to plaintiff only three carloads of the same wine for cash but otherwise at the contract price and terms, then you cannot award plaintiff any lost profits on those three cars, aggregating approximately 4,500 cases, because plaintiff's duty to keep his damages down exists even though the Bercuts were the only source

whence the wine could be obtained. The 26,691 cases covered by the contract must accordingly be reduced to the extent of the three carloads or approximately 4,500 cases.

Lawrence v. Porter, 6 Cir., 63 Fed. 62, 66,
and cases there cited;

Brookridge Farm v. U. S., 27 F. Supp. 909,
910-911.

Given ST. SURE, D J [88]

Defense Request No. 40

If you find that immediately after the cancellation agreement of April 27, 1943, was signed and delivered, Jean Bercut offered to the plaintiff not merely three carloads but all of the 26,691 cases of wine on hand at the prices stated in the contract, but for cash in advance, then in that event I instruct you that regardless of whether or not other wine was available elsewhere in the market, you cannot award to plaintiff any damages because of a market price in excess of the contract price, nor any damages because of loss of anticipated profits.¹ The only damage to plaintiff through paying cash in advance would be limited to interest for the use of its money for the short period of time between the date of cash payment in advance and the time of arrival of the wine at destination thereafter when the plain-

¹ Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117.

tiff would otherwise have been required to pay the draft attached to the bill of lading for each carload.²

² Warren v. Stoddart, *supra*;

Note, 46 A.L.R. 1192, at 1194; and California cases at 1195;

Lawrence v. Porter, 6 Cir., 63 Fed. 62.

Given ST. SURE, D J

[Endorsed]: Filed Mar. 22, 1944. [89]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Seventy two thousand six hundred eighty seven and 50/100 (\$72687.50) Dollars.

A. L. HAMMILL

Foreman

3/22/44

[Endorsed]: Filed at 4 o'clock and 5 Min. P. M. Mar. 22, 1944. C. W. Galbreath, Clerk. By Edward A. Mitchell, Deputy Clerk. [90]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 22625-S

PARK, BENZIGER & CO., INC., a corporation,
Plaintiff,

vs.

PIERRE BERECUT and JEAN BERECUT, indi-
vidually and as co-partners doing business as
P & J Cellars, a co-partnership, FIRST DOE
and SECOND DOE,
Defendant.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on
March 14, 1944, being a day in the March 1944 Term
of this Court, before the Court and a Jury of twelve
persons duly impaneled and sworn to try the issues
joined herein; Alfred F. Breslauer, Esq., Mrs.
Thelma Herzig, George G. Olshausen, Esq., and M.
Mitchell Bourquin, Esq., appearing as attorneys for
the plaintiff, and Louis H. Brownstone, Esq., and
Geo. M. Naus, Esq., appearing as attorneys for the
defendants, and the trial having been proceeded
with on the 14th, 15th, 16th, 17th, 20th, 21st, and
22nd days of March in said year and term, and oral
and documentary evidence on behalf of the respec-
tive parties having been introduced and closed, and
the cause, after arguments by the attorneys and the
instructions of the Court, having been submitted to

the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Seventy two thousand six hundred eighty seven and 50/100 Dollars (\$72,687.50). A. L. Ham-mill, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs; [91]

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendants the sum of Seventy-two Thou-sand Six Hundred Eighty-seven and 50/100 Dollars (\$72,687.50), together with its costs herein expended taxed at \$422.75.

Judgment entered this 22nd day of March, 1944.

C. W. GALBREATH,

Clerk.

[Endorsed]: Filed Mar. 22, 1944. C. W. Gal-breath, Clerk. [92]

[Title of District Court and Cause.]

Counsel Appearing:

For Plaintiff:

Alfred F. Breslauer, Esq.,

Mrs. Thelma Herzig,

George G. Olshausen, Esq.,

M. Mitchell Bourquin, Esq.

For Defendants:

Louis H. Brownstone, Esq.,
George M. Naus, Esq.

Tuesday, March 14, 1944—10 A. M.

(A jury having been duly empanelled and sworn to try the cause, an adjournment was taken until Wednesday, March 15, 1944.)

Wednesday, March 15, 1944—10 A. M.

(Opening statements were made to the jury, on behalf of the plaintiff by Mr. Bourquin, and on behalf of the defendants by Mr. Naus, after which the following proceedings were had:) [95]

PHILIP ELMAN,

called for the Plaintiff; sworn.

Direct Examination

Mr. Bourquin: Q. Mr. Elman, you live in New York? A. Yes, sir.

Q. Has that always been your home?

A. For the past twelve years.

Q. And you are connected with the Park, Benziger Company, are you? A. Yes, sir.

Q. What is that, a corporation?

A. It is a corporation.

Q. What is your connection with the corporation? A. I am the vice president.

(Testimony of Philip Elman.)

Q. You are the vice president?

A. In charge of sales and promotion.

Q. Sales and promotion; that is the function committed to you, is it? A. Yes, sir.

Q. How long have you been with Park, Benziger? A. Since 1939, sir.

Q. Was that the formation of Park, Benziger, or can you tell us?

A. No, that was not the formation of Park, Benziger. As I understand it, the formation of Park, Benziger took place in 1855.

Q. And they have been engaged in business ever since that time? A. Yes.

Q. And are today? A. And are today.

Q. You were the vice president in charge of sales and promotion at the time we are speaking of here in the statements made to the jury this morning?

A. I was.

Q. What has been the nature of the business of Park, Benziger?

A. Export-import, and we had a whiskey and wine department, [96]

Q. You had a whiskey and wine department?

A. Yes, sir.

Q. Prior to January 1943 did your concern engage in the export and import of wines and liquors?

A. Yes, we did.

Q. Let me ask you this: Were you familiar with the situation in the wine industry, and more correctly in the wine market, at the commencement of the year 1943? A. Yes, we were.

(Testimony of Philip Elman.)

Q. What was it, please?

A. We were importing quite a lot of wines from various countries. Most of our business had been import, and due to conditions over in Europe that came about in 1940 with France, we continued to receive less and less import wines, and we were more or less becoming interested in doing a domestic wine business to fill that gap of imported wines, and so we commenced to do business with certain domestic manufacturers of wines looking to find and acquire certain agencies for good producers to sell in place of our import wines.

Q. What was the situation in the United States and interstate in the wine industry or the wine market at the commencement of the year 1943?

A. At that time the OPA and the freeze of grapes the previous year by the United States Government for use for raisins for the armed forces of this country created a tremendous shortage in available grapes for wine in California, which resulted in a very short crop and manufacture of grapes in the year preceding that, in 1942, so that in 1943 the condition of the wine market had become so acute there were no wines available for sale to us. We purchased small lots of wines that we were able to get, but, of course, we were interested more or less in acquiring larger amounts of wine to substantiate the amount of business that we had, because we couldn't import wines. We could find no wines on the [97] market.

(Testimony of Philip Elman.)

Q. Did the operations of the distillers have an influence on the market at that time?

A. Yes, they did. In March 1942 the distillers, because of the fact that they were stopped from distilling whiskies for their own or for public consumption, but were put to the business of making alcohol for butadaine and other products that the Government needed, started to ration their merchandise, and they became interested in the acquisition and purchase of other merchandise to replace the smaller volume of whisky that they were going to release in order to protect stocks for continuity purposes to the markets, and they went into the wine business in order to purchase wines which they wanted for distillation into fruit spirits, that they could blend with their whiskies to stretch their whisky stock, because grain spirits were condemned by the Government for the purpose of manufacture of alcohol—at least, gunpowder. The grain spirits are used in glycerin to make smokeless gunpowder.

Q. Was there any influence of their operations upon the sale and shipment of bulk wines?

A. Oh, yes, it froze the shipment of bulk wines interstate in this respect: There was an interstate OPA ceiling set up, but not an industry ceiling, so the small producers or the producers in California—it didn't pay for them to ship bulk outside of the State of California, while this interstate condition existed. Therefore they had to hold back the bulk of their merchandise, and people like Schenley and

(Testimony of Philip Elman.)

various other distilleries that came along bought those bulks, acquired those bulks for their own purpose, for their own distillation, and the acquiring of additional business and bulk shipment ceased to the [98] bottlers in the East entirely, so the bottlers did not get any wine out there, and they all started to flock to California to see if they could possibly find some small wineries that would be willing to sell them bulk wines that they could pick up and keep their bottling plants in the East going.

Q. At the commencement of 1942 did your concern know Mr. George Hermann?

A. Yes, we did.

Q. Had you done business with him prior to that time? A. Yes, we did.

Q. For about how long?

A. For about a year.

Q. What was his business at that time?

A. A wine broker, and wine merchant.

Q. Was he connected with Park, Benziger?

A. No, he was not.

Q. Did you know of his trip to California in 1943, that is, know of it when he made it?

A. Yes, about a week before.

Q. Did your concern send him?

A. No, we did not.

Q. Or finance his trip?

A. No, we did not.

Q. Or commit any commission to him?

A. No, we did not.

(Testimony of Philip Elman.)

Q. Had you done business with Bercut Brothers prior to January 1943? A. No.

Q. During January 1943 did you receive any word from Mr. Serge Hermann with respect to California wines?

A. Yes, we received a telegram from Mr. Serge Hermann stating——

Mr. Naus: One moment. I ask for the telegram.

Mr. Bourquin: Q. Have you the telegram with you, Mr. Elman? A. I believe we have.

Mr. Naus: No objection. I do not suppose it will include the pencil marks?

Mr. Bourquin: No, it won't include the pencil marks.

Q. Is this the telegram—— [99]

Mr. Naus: I will assume it is, Mr. Bourquin.

Mr. Bourquin: May I offer it and read it in evidence?

The Court: It will be admitted.

(The telegram was marked

“PLAINTIFF’S EXHIBIT 1.”)

Mr. Bourquin: It is addressed to Philip Elman, care of Park, Benziger.

“Have definitely completed the finest bottle deal dreamed of. Suggest you phone me on receipt this wire. Kindly advise Irene am well. Regards.”

(Testimony of Philip Elman.)

The Court: What is the date of that?

Mr. Bourquin: February 2, 1943.

Q. That is the wire you refer to, Mr. Elman?

A. That is right.

Q. Did you following that receive a contract with Bercut Brothers for the sale and delivery of wine?

A. Yes, we did.

Mr. Naus: I will waive the foundation. There is more than one date recorded there. There are three different dates.

Mr. Bourquin: I will forego that examination until we have uncovered that proposition.

Mr. Naus: I have no objection to the documents themselves.

Mr. Bourquin: Q. Mr. Elman, when was it that you received the contract of Bercut Brothers—about when?

A. About February 15.

Q. From whom, please?

A. Mr. Serge Hermann.

Q. At what place?

A. At our office in New York.

Q. At that time did you transact any business with relation to that with Mr. Hermann?

A. Yes, we did. We purchased the contract from them and gave them a good deal on it.

Mr. Bourquin: I will ask the Court at this time that this contract, together with the instruments attached, which include [100] the supplemental agreement of February 3, 1943, and the assignment dated February 25, 1943, be admitted in evidence and marked as Plaintiff's Exhibit 2.

(Testimony of Philip Elman.)

The Court: I understand there is no objection.

Mr. Naus: No objection to the contract itself. The witness has not yet touched on the events of February 25. I suppose Mr. Bourquin will touch on them. If he doesn't I will.

Mr. Bourquin: Yes, I will, your Honor.

The Court: That will be Exhibit 2.

(The documents were marked "Plaintiff's Exhibit 2.")

Mr. Bourquin: May I read this document to the jury?

The Court: You may if you wish.

Mr. Bourquin: I think I would like to read some of it, with counsel to pick out any parts that he thinks pertinent that I do not call attention to now.

PLAINTIFF'S EXHIBIT 2

"AGREEMENT

"This Agreement entered into this 29th day of January 1943 by and between Pierre Bercut and Jean Bercut, doing business as a copartnership, under the firm name and style of P & J Cellars, License No. 14-P-175 at 743 Market Street in the City and County of San Francisco, State of California, hereinafter referred to as party of the first part and Chateau Montelena of New York, License No. WW9 with offices at 48 West 48th Street in the City and State of New York herein represented by Serge Hermann, its duly authorized special representative residing at No. 321 West 55th Street, Borough

(Testimony of Philip Elman.)

of Manhattan, City and State of New York
party of the second part.

Witnesseth:

Whereas the party of the first part is the owner of [101] certain stocks of wines of various kinds and vintage and

Whereas the party of the second part is desirous of purchasing said wines on an installment basis over a period of years.

Now, Therefore, in consideration of the mutual promises and covenants herein contained, and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid, receipt of which is hereby acknowledged it is mutually agreed as follows:

First: The party of the second part hereby agrees to purchase approximately 60,000 cases of assorted bottled in California wines, part of which is at present bottled and stored and the balance to be bottled under the terms and conditions to be mutually agreed upon.

Second: The party of the second part hereby agrees to take delivery of said wine at the rate of one carload each and every consecutive month hereafter for the next three years, the first carload to be taken during the month of February 1943 and continue thereafter as stated up to the year 1945, with the understanding, however, that should the party of the second part desire additional quantities for the holi-

(Testimony of Philip Elman.)

days a maximum of two cars may be shipped in a particular month, provided ample notice of such intention is given to the party of the first part.

Third: The quantities now bottled and stored may be stated approximately as follows:

Burgundy	7,167 cases of 12 bottles of fifths per case
Claret	7,145 cases of 12 bottles of fifths per case
Rhine Wine	6,587 cases of 12 bottles of fifths per case
Sauterne	4,095 cases of 12 bottles of fifths per case
Sherry	834 cases of 12 bottles of fifths per case
Port	863 cases of 12 bottles of fifths per case

[102]

and the price for this block of merchandise herewith mutually agreed upon to be paid to first party by second party shall be as hereby stated and subject to the terms and conditions herein stipulated. During the year 1943 dry wines will be billed on the basis of Five Dollars and twenty-five cents (\$5.25) per case and the sweet wines at Six Dollars (\$6.00) per case. Prices F.O.B. San Francisco, California. During the year 1944 payment shall be made on the basis of Five Dollars and fifty cents (\$5.50) per case for dry wines and Six Dollars and twenty-five cents (\$6.25) per case for sweet wines F.O.B. San Francisco, California.

It is agreed that shipment of the above mentioned quantities will be made first and before any other commitments, and that the balance of the amount of the sale, which has not been

(Testimony of Philip Elman.)

bottled, is to be paid for proportionately as between dry wines and sweet wines the same, but subject to negotiations between the parties hereto whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945.

Fourth: Second party hereby agrees that the assorted quantities bottled and stored have been sampled by him and are herewith accepted in entirety, and the party of the first part assumes no further liability as to the quality of the wines, but on quantities not yet bottled it is agreed that prior to acceptance, samples will be forwarded [103] to the party of the second part for its approval, and in the event of non-approval nothing herein contained shall prevent party of the first part from disposing of such stocks through other channels should it so desire.

Fifth: That the manner of payment shall be by sight draft with Bill of Lading attached F.O.B. San Francisco, California drawn on second party for each shipment by car or steamer as the case may be.

Sixth: The party of the first part herewith stipulates that all taxes of any description

(Testimony of Philip Elman.)

levied upon said wines have been paid as of this date and second party herewith agrees to assume the payment of any and all taxes that may be levied upon said wines subsequent to the date hereof, by the Federal, State, Municipal or any other constituted authority.

Seventh: The party of the first part shall assume all storage charges on the stocks remaining unshipped in San Francisco, and will carry sufficient insurance to protect the interests of both parties hereto, but in the event of destruction or damage to the stock due to fire, earthquake, acts of God, acts of war, the public enemy or any other causes beyond the control of party of the first part it is clearly understood that the terms hereof shall be inoperative.

Eight: The party of the second part shall supply at his own expense labels of his own choice to be affixed to the bottles, and shall also supply a special strip to be attached to each bottle of suitable design and appearance approved by party of the first part with the inscription placed thereon 'Selected by Bercut Freres', and the [104] party of the second part without allotment herewith agrees to conform to all the existing rules and regulations pertaining to labels and to any future legal aspects that may be formulated holding the party of first part harmless from any and all controversies that may arise.

(Testimony of Philip Elman.)

Ninth: The party of the first part hereby agrees to supply suitable cases for shipment out of San Francisco, said cartons to be in conformity with recognized practice in the shipment of wines to New York, but in the event of inability to secure standard cartons due to war conditions or priorities reserves the right of substitution to other cartons mutually considered to be of sufficient tensile strength for shipment to New York under normal conditions of handling by the carriers. The party of the first part hereby agrees to furnish the labor for casing and affixing the labels and to deliver on cars or docks as desired in San Francisco.

Tenth: The party of the first part hereby grants unto second party the right to establish its own resale prices in all states, territories or for export.

Eleventh: The parties hereto mutually agree that the terms and conditions of this agreement shall be binding upon the heirs, executors, beneficiaries or successors in interests of both parties, and that in the event of any disagreement or conflict of interpretation respecting any of the provisions hereof it is specifically agreed that the laws of the State of California shall govern and that should it be necessary to adjudicate any of the provisions herein such adjudication shall be submitted to a Court of

(Testimony of Philip Elman.)

competent jurisdiction in San Francisco, [105]
California.

In Witness Whereof the parties hereto have
set their hands this 29th day of January 1943.

P. & J. CELLARS

By PETER BER CUT

First Party.

CHATEAU MONTELENA
OF NEW YORK

By SERGE HERMANN

Second Party.”

The supplemental agreement attached hereto
dated San Francisco, California, February 3, 1943,
is in the form of a letter addressed to Chateau Mon-
telena of New York.

“Gentlemen:

With reference to our agreement executed on
the 29th day of January 1943 the following re-
visions or additions are herewith made, said ad-
ditional data to be included and to form part
and parcel of the original agreement:

1. That the quantities stipulated as bottled
as of this date are to the best of our knowledge
vintage wines of 1937 and 1938.

2. That shipments of first car are to be made
at such time as approval of labels can be
secured and both parties are in a position to

(Testimony of Philip Elman.)

effect shipments, but the greatest diligence should be exercised by both parties in order to commence at least 60 days hence.

3. That the wines purchased have been produced and bottled by the California Wine Association and that an inscription bearing these words can be placed upon the labels.

All other terms and conditions are to remain without [106] change and in full force and effect.

Very truly yours,

P & J CELLARS

By PETER BERGUT."

And the assignment dated New York, February 25, 1943, reads as follows:

"Park, Benziger & Co., Inc.,
24 State St.,
New York, N. Y.

Dear Sirs:

As per our agreement, we hereby assign to you the agreement and all rights thereunder, made on January 29, 1943, with Pierre Bergut and Jean Bergut, doing business under the name of P. & J. Cellars, of San Francisco, California.

Yours very truly,

CHATEAU MONTELENA
OF N. Y.

Per SERGE HERMANN."

(Testimony of Philip Elman.)

Q. Mr. Elman, did you subsequently come to San Francisco on this transaction?

A. I did, sir.

Q. Prior to your departure from New York did you obtain or receive any samples of this wine?

A. Yes—I am sorry.

Q. Did you obtain or receive any samples of this wine prior to your departure from New York to come to San Francisco? A. We did, sir.

Q. From whom did you receive them, please?

A. From P & J Cellars.

Q. From P & J Cellars; that is referred to in the contract. What do you recall was the nature of the samples that you received, the nature or the quantity?

A. There were two cases of assorted wines. [107]

Q. Two cases of assorted wines?

A. Assorted wines, sweets and dries. There were six types, as I recall it, four dries and two sweets.

Q. Calling your attention to the time at which Mr. Serge Hermann wrote a letter to Bercut Brothers advising them that he had sold and assigned this contract, did you have knowledge of that transaction?

Mr. Naus: One moment, please. That assumes such a letter was written. I ask that the letter be produced before the witness is examined on it. I might say I have no recollection of any such letter.

Mr. Bourquin: It may be a matter of our views on this. I am referring to this letter, and I do not

(Testimony of Philip Elman.)

mean to give it any character except what it is decided to have by the jury.

Mr. Naus: Just so it is clear that you are not offering it as showing Mr. Serge Hermann advised the Bercuts that the contract was assigned.

Mr. Bourquin: I do not. I say that will be my contention, your Honor.

Mr. Naus: I submit the objection as assuming something not in evidence.

The Court: There isn't anything in evidence.

Mr. Bourquin: There isn't anything in evidence, your Honor. Perhaps I had better withdraw that question and approach the matter with another:

Q. Calling your attention, Mr. Elman, to a letter on the stationery of Park, Benziger & Company under date of February 15, 1943 and signed "Sincerely, Serge," for "Serge Hermann", addressed to Mr. Pierre Bercut, do you recall the writing of that letter?

A. I do, sir. That was done in our office in [108] my presence and in Mr. Benziger's presence also.

Q. Before we come to that letter, let me ask you: When did you obtain the samples from the Bercut Brothers, do you recall? Was it prior to or subsequent to the writing of this letter?

A. Oh, it was prior to the writing of this letter. We received the samples of the merchandise from Bercut Brothers, and then Mr. Serge Hermann came back to New York and we discussed the contract with Mr. Hermann at that time, and we agreed

(Testimony of Philip Elman.)

to take it over, and he wrote this letter at our request at that time.

Mr. Bourquin: I will offer the letter in evidence at this time and ask if I may read that to the jury.

The Court: You may.

(The document was marked "Plaintiff's Exhibit 3.")

Mr. Bourquin: The letter I refer to is on the stationery of Park, Benziger, stamped "Air Mail," under date of February 15, 1943, and is addressed to Mr. Pierre Bercut, c/o Bercut Brothers.

PLAINTIFF'S EXHIBIT 3

"Dear Pierre:

I just returned home last Saturday afternoon. For the last couple of hours we have done nothing else, Mr. Benziger, Mr. Elman and myself, but to talk over the arrangements that I made with you, and I am glad to advise you that they are quite pleased, and I have no doubt that we will develop relations which will prove mutually profitable and agreeable.

The first thing we are now doing is to work on a label. Many suggestions are being made, and of course before we decide upon one, we want to think the matter over very carefully because it is of such extreme importance, and once we have decided what label should be used, [109] it will have to be a good label. At any rate, we will send our final choice to you, so that

(Testimony of Philip Elman.)

you may have a chance to give us also your reaction to same.

From now on I would suggest to you that all correspondence and everything pertaining to our relations be written direct to Park, Benziger & Co., Inc., 24 State St., New York, N. Y., so that it may be given proper attention.

As explained to you in San Francisco, it is my intention, as soon as a label is finished, to come over to San Francisco so as to supervise the first shipment, and I sincerely trust that either Mr. Benziger or Mr. Elman may find it possible to join me in order to meet you and lay the foundation to our future relations.

With reference to the Chianti which you were kind enough to offer me, we are enclosing herewith orders, which are self explanatory. Would you be kind enough to send us a case of this Chianti in pints, billing us with same.

With regards to the label, you will recall that when we were down to see Verdier you showed me a label with a picture of the Napa Valley, which was indeed very beautiful. You suggested then that you would secure the cut for me. We have an idea that this picture of the Napa Valley would look very pretty in conjunction with the label that we have in mind. Will you please, therefore, send us the cuts of the Verdier label.

If you have already taken the pictures which

(Testimony of Philip Elman.)

you contemplated taking of the warehouse with the bottles racked, I would appreciate your sending them to us. If what you have taken is in the form of films, as you [110] intended, we can make the enlargements here ourselves. Everything, of course, in the line of advertising will help.

I have told Park, Benziger & Co. that you would be kind enough to co-operate with them by making a few placements in some of the high spots of San Francisco on our new wine labels. They appreciate your thoughtfulness in this matter, and we will at some future date be able to use this type of placement for promotion material here in the East.

I take this opportunity in behalf of Mr. Benziger, Mr. Elman and myself of thanking you for the many courtesies shown me when I was in San Francisco and can assure you of our future co-operation with the hope that it will benefit all concerned.

With kindest personal regards to Jean, Henri and yourself,

Sincerely yours,
SERGE."

There are attached orders of 2,000 cases of light wine, Chianti type bottles, and 500 cases of the same with instructions for labeling and shipment from

(Testimony of Philip Elman.)

J. R. Benziger, President; and there is another order of a similar type of Park, Benziger's attached.

Mr. Naus: Mr. Bourquin, I assume that we are in agreement that those orders in the Chianti type bottles were unrelated to the contract in issue.

Mr. Bourquin: No, we are in agreement that these are other wines.

Q. Mr. Elman, you said on February 15, as that letter indicates, [111] you had made an arrangement with Mr. Hermann and took over the contract; is that true? A. Yes, we did.

Q. Did you subsequently cause him to execute the written assignment of the contract that appears on Plaintiff's Exhibit 1 here now?

A. Yes, we did.

Q. Under date of February 25?

A. That is right.

Q. Did you at the time you bought his contract make an arrangement with Mr. Hermann for a consideration for him?

A. Yes, we made an arrangement with Mr. Hermann for the assignment of the contract. [112]

Mr. Naus: I assume the original of this is no longer available, Mr. Bourquin (referring to document handed to Mr. Naus by Mr. Bourquin).

Mr. Bourquin: I have asked Mrs. Herzig, who tried the case before——

Mr. Naus: At the other trial I asked for the production of the original which was supposed to be

(Testimony of Philip Elman.)

still in New York, so in lieu of that we used the photostat. We can still use the photostat if the original is unavailable here, but if it is here I would like to see it.

Mr. Bourquin: Well, if we have the original here we will produce it. May I use the photostat now?

Mr. Naus: Proceed. Can Mrs. Herzig let us know at two o'clock if you have the original?

Mr. Bourquin: Yes. I don't need to identify this further, Mr. Naus?

Mr. Naus: No.

Mr. Bourquin: We will offer this in evidence.

The Court: Admitted.

(The document was received in evidence and marked Plaintiff's Exhibit 4.)

Mr. Bourquin: This letter is on the stationery of Park, Benziger & Co., Inc., and the letter is dated February 25, 1943, and is addressed to

PLAINTIFF'S EXHIBIT 4

"Mr. Serge Hermann,
48 West 48th St.,
New York, N. Y.

Dear Mr. Hermann:

In consideration of your assigning to Park, Benziger & Co., Inc. the contract which Chateau Montelena of New York, represented by Serge Hermann, made with Messrs. Pierre and Jean [113] Bercut, trading as P. & J. Cellars,

(Testimony of Philip Elman.)

of San Francisco, California, covering an approximate lot of 60,000 cases of Assorted Wines, we hereby agree to pay you a commission equal to 50% of the net profits derived from the handling and sale of these goods at wholesale or retail, and you are to exert your efforts to the best of your ability in the promotion and sale of the above merchandise.

You are also to participate in any further business we may have with P. & J. Cellars on the same basis. If we sustain a loss on any business with P. & J. Cellars, such loss shall be charged against future profits in the computation of your commission on future business.

Yours very truly,

PARK, BENZIGER & CO., INC.,
J. R. BENZIGER,
President."

Mr. Bourquin: Q. Following the dispatch of the letter of February 15 that has been marked here as Plaintiff's Exhibit 3, which you say Mr. Hermann wrote at your instance to Bercut Brothers, did you receive a letter acknowledging receipt of that?

Mr. Naus: You are assuming he said it was written at his instance. He said it was written in the presence of the two. There is no suggestion so

(Testimony of Philip Elman.)

far of Hermann writing it at the instance of——

The Court: I thought Mr. Elman said he suggested that Mr. Hermann write the letter.

The Witness: I did, sir.

Mr. Naus: I will accept that.

Mr. Bourquin: Q. Did you receive a reply from Bercut Bros., a reply letter to that letter?

A. Yes, we did, sir. [114]

Mr. Naus: As to any letters used at the former trial you can proceed without a further foundation and if either of us has any original that has not been produced before we will produce it.

Mr. Bourquin: All right. I am calling attention to a letter on the letterhead of Merchants Ice & Cold Storage Company, dated February 26, 1943. We will ask it be admitted as Plaintiff's Exhibit next in order.

The Court: Admitted.

(The document was received in evidence and marked Plaintiff's Exhibit 5.)

Mr. Bourquin: I think I should read it.

The Court: Proceed.

Mr. Bourquin: A letter on that letterhead addressed to:

(Testimony of Philip Elman.)

PLAINTIFF'S EXHIBIT 5

“Park, Benziger & Co., Inc.,

25 State Street,

New York City, N. Y.

Letter #1

Attention: Mr. Jos. P. Benziger, President

Dear Mr. Benziger:

This communication will acknowledge your letter and enclosure relative to various matters pertaining to our wine transaction. It will also confirm the exchange of telegrams between us as follows:

Ours—Feb. 24, 1943: ‘ODT regulations prohibit shipment less than 50,000 lbs. Necessary increase number of cases 550 total 1300 for approximate minimum. Wire instructions regarding inclusion other stock to effect shipment’

Yours—Feb. 25, 1943: ‘Re your wire 24th reference our Order Number One. Hold shipment pending airmail instructions.’ [115]

The photographs, which your Mr. Serge Hermann desired, have been forwarded, and shipment of one case of (Cresta De Oro) Chianti type bottles 12/30 oz. bottles to a case has been shipped by express today in accordance with the instructions in his telegram.

Tonight the following wire was forwarded to you: ‘Sufficient additional cases 12/30 oz Chianti available to ship minimum car 50,000

(Testimony of Philip Elman.)

pounds. Wire permission to ship if satisfactory. Sample for Hermann express today.'

Upon receipt of your reply to this wire it may be possible to ship the first of next week. At that time the 750 cases mentioned in your order No. 1 at \$6.00 per case plus 550 cases applying on the 2,000——"

That was the Chianti, I guess?

Mr. Naus: The whole letter is about the Chianti, with the exception of the reference to the sample to be expressed.

Mr. Bourquin: That is a matter of construction.

Mr. Naus: Well, you asked me, Mr. Bourquin. I gave you my understanding.

Mr. Bourquin: I don't think it makes any difference. (Resumes reading:)

"2,000 cases mentioned in order No. 2, @ \$6.50 per case, and plus the 6 cases comprising one case of each kind of wine in stock at the prices quoted in our contract could be forwarded."

Now, in view of the discussions, I would like to read that paragraph again.

The Court: Very well.

Mr. Naus: Surely.

Mr. Bourquin: (Resumes reading)

"Upon receipt of your reply to this wire it may be possi- [116] ble to ship the first of next week. At that time the 750 cases mentioned in your order No. 1 at \$6.00 per case plus 550

(Testimony of Philip Elman.)

cases applying on the 2,000 cases mentioned in order No. 2, @ \$6.50 per case, and plus the 6 cases comprising one case of each kind of wine in stock at the prices quoted in our contract could be forwarded.

Your procedure concerning the labels has been noted. Naturally, we do not have any interest insofar as the identity of the supplier is concerned, although we are keenly interested in the design of the label when completed.

We were pleased that the arrangements made by your Mr. Serge Hermann met with your approval and will be looking forward to your contemplated visit to our city.

In our opinion, it is quite possible to lay the foundation for a continuing mutually profitable relationship in the distribution of wines, and maybe promote a thriving industry based on the aging of wine in bottles.

With kindest regards to Mr. Hermann.

Very truly yours,

PETER BERCUT."

The Court: Will you kindly give us the date of that letter?

Mr. Bourquin: That letter, your Honor, is February 26, 1943.

Q. Mr. Elman, will you please tell us briefly what did Park-Benziger do with respect to their

(Testimony of Philip Elman.)

side of the contract in the preparation of labels at New York?

A. We held several conferences in the offices, at which time we were discussing different phases of the labels that should be used for domestic wines and that would also reflect the quality of the merchandise which we had purchased. We hired artists to design for us labels and submit them for our approval so that [117] out of the artists' drawings submitted to us we could take one label which we sent to Washington to have it federally approved after we had decided with great care as to the type that we wanted, and we submitted the information that we were desirous of putting on that label to see whether it met the regulations required by Washington, to see if we could put what we wanted on those particular labels drawn up by the artists and forward the proper forms and sheets to Washington. We were in the process of making up a label which we were going to bring out here to affix to the bottles of wines which we had purchased under this contract. We were performing that end of the terms of that contract.

Q. When did you come to San Francisco to arrange delivery? A. That was April 16th, sir.

Q. That was April 16th. Had Park, Benziger then decided upon its label?

A. Yes, we had. By that time we had sent a copy of a label to Mr. Hermann, who had preceded me here, and had asked him to show it to Mr. Ber-

(Testimony of Philip Elman.)

cut, and he had wired back that Mr. Bercut had seen the label and liked it, and from that point on we were satisfied to go ahead with the final completion of running labels for the merchandise.

Mr. Bourquin: I desire, Mr. Naus, at this time to put in evidence the labels that were formerly marked Exhibit 9. Are you familiar with that exhibit?

Mr. Naus: Yes. They were called a proof sheet at the other trial.

Mr. Bourquin: Q. I will show you, Mr. Elman, what I hold in my hand and ask if that represents the label which was decided upon by Park, Benziger & Company? A. It was.

Mr. Bourquin: I ask that the document showing the two labels, [118] or style of labels, whichever you call it, be admitted in evidence as plaintiff's exhibit.

The Court: Admitted.

(The document was received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Bourquin: Q. Following your purchase of that contract, you had arranged with Mr. Hermann, did you, you had entered arrangements for the services of Mr. Hermann in the sales of the wines?

A. Yes. We decided to employ Mr. Hermann as a salesman of Park, Benziger & Company, and we submitted to the New York State Liquor Authorities an application for a solicitor's permit in New York State.

(Testimony of Philip Elman.)

Q. That was a solicitor's permit issued at your request to him as a solicitor or salesman for Park, Benziger & Company? A. Yes.

Q. Taking effect when?

A. Taking effect almost immediately, after we had decided to purchase the contract from him.

Q. Well, that was February 15th to February 25th, as I understand it? A. Yes.

Q. When you completed your paper work?

A. After February 25th, yes.

Q. When you came to San Francisco. Mrs. Herzig calls my attention to that permit——

Mr. Naus: Would you simply state the substance of it to the jury? I believe it goes back to February 20, 1943.

Mr. Bourquin: I am not sure.

Mr. Naus: No objection.

Mr. Bourquin: I think I will read it, your Honor, or state the substance of it.

The Court: Proceed.

Mr. Bourquin: A solicitor's permit, No. 2968, State of New York Liquor Authority, Expires December 31, 1943. This cer- [119] tifies that Serge Hermann, whose photograph—the name of the solicitor whose photograph and signature appear here, is authorized to solicit and receive orders for the sale of alcoholic beverages in the State of New York for Chateau Montelena of New York. This one that I have here shows permit—I will read it—
“Chateau Montelena of New York License Number

(Testimony of Philip Elman.)

—Year 1943. Permit not valid unless it is signed and the State Seal affixed. State Liquor Authority.” That is signed by a signature that I am not able to decipher. On the back of the permit shows, “First endorsement Park, Benziger & Co., Inc., LL 281 (G). Is that the license? A. Yes.

Q. For which you have testified arrangement was made? A. That’s right.

The Court: Does it have a date?

Mr. Bourquin: The only date on it, your Honor, shows on the face of it that this permit expires December 31, 1943.

Mr. Naus: That is merely a solicitor’s permit for while he theoretically was a salesman for Chateau Montelena of New York, and then the solicitor’s permit was transferred from Chateau Montelena of New York to Park-Benziger.

Mr. Bourquin: Yes.

Mr. Naus: I don’t think Hermann, himself, ever had anything other than a solicitor’s license.

Mr. Bourquin: I don’t think it is material. If it is you can bring it out.

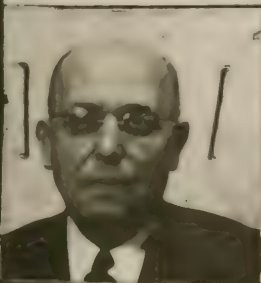
(Solicitor’s license was received in evidence and marked Plaintiff’s Exhibit 7.)

This certifies that

SERGE HERMANN

(Name of solicitor)

whose photograph and signature appear hereon, is authorized to solicit and receive orders for the sale of alcoholic beverages in the State of New York for



Chateau de la Lena of
New York (Lic. No.)

(Signature of solicitor)

This permit is not valid unless it is signed and the State Seal affixed.

STATE LIQUOR AUTHORITY

By

(OVER)

FIRST ENDORSEMENT

Mark Benziger, de la Lena
(Name of licensee) (License No.)

SECOND ENDORSEMENT

(Name of licensee)

(License No.)

THIRD ENDORSEMENT

(Name of licensee)

(License No.)

FOURTH ENDORSEMENT

(Name of licensee)

(License No.)

FIFTH ENDORSEMENT

(Name of licensee)

(License No.)

NOTICE

No solicitor shall offer or give any refund, rebate or thing of value or render any service to any licensee for the purpose of influencing a sale. The permit of any solicitor engaging in any such act or who is a party thereto shall be revoked. When the solicitor's employment is discontinued this permit must be surrendered to the zone office of the State Liquor Authority which issued such permit.

No. 22625

Pety Exhibit No. 7
Filed *March 15, 1943*

W. Calbreath, Clerk

By *Edward G. Hutchins*

No. 22625

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Walter B. Maling, Clerk

By *Edward G. Hutchins*

(Testimony of Philip Elman.)

Mr. Bourquin: Q. When you arrived in San Francisco, Mr. Elman, did you meet the Bercut Brothers? A. Yes, I did. [120]

Q. You said you arrived here on the 19th, or the 18th——

The Court: On the 16th.

The Witness: Around the 16th.

Mr. Bourquin: Q. Where did you meet the other gentlemen, and with whom?

A. I met Mr. Jean Bercut and Mr. Henry Bercut at the market just the first time I arrived. Subsequent to that I met Mr. Peter Bercut, and that was while Mr. Hermann and I were together.

Q. You remained in San Francisco at that time for how long? A. For several weeks.

Q. For several weeks? A. Yes.

Q. Did you see Mr. Jean Bercut or Mr. Peter Bercut, or both of them, from time to time after your first visit?

A. Consistently; every day from the date I arrived. I believe I came here on a Friday. I saw him Friday and Saturday, and then we did not see him on Sunday, and Monday, which was a business day, we started in with our meetings again with either Mr. Jean Bercut or Mr. Peter Bercut, consistently, right through that entire week, working and arranging for the bottling of those wines. I went down to see the wines, I had never seen them before, saw how they were racked to get a picture of it so I could build it into a campaign of promo-

(Testimony of Philip Elman.)

tional sales. We had started taking films of the huge warehouse with Mr. Jean Bercut or Mr. Peter Bercut alongside the wines, looking at a bottle of wine. Those films were to be used for promotional work to show the huge 325,000 cases bottled, at least 325,000 bottles that were built into that magnificent warehouse there, that were aged and stored and racked. This was going to be the story on the business of aging wines in this country, it was something entirely new and novel. I mean it had never been done in the United States. [121]

Q. When you went to see the wine who did you go with?

A. With Mr. Hermann and several friends of ours, and Mr. Jean Bercut, and I went with Mr. Peter Bercut once.

Q. During that week that you spoke of here, did you hold any discussions or conferences with either of the Mr. Bercuts, or together with them, with respect to the packing or shipping of the wine?

A. Yes, yes.

Q. Tell us the substance of your discussions and what transpired in that respect.

A. Well, we were discussing the legal information that had to go on the cases, the cartons. In other words, these were tax-paid wines, and they require a little different information than the average type of bottled wine which is bottled in a winery, bottled at the winery or bottled from these various vats or tanks. There were discussions about

(Testimony of Philip Elman.)

the stamps, the Internal Revenue stamps which are affixed to the cartons, and that information is contained on the side of the carton, but in this particular instance all the wines had been tax-paid in the storage warehouse at the Merchants Ice & Cold Storage, or P. & J. Cellars.

Q. Had you finished?

A. Well, all the bottles had a small sticker that was affixed to them, that said they are sold for intra-state sale only and tax paid by stamps affixed, and the usual information pertaining to the fact it comes from tax paid containers.

Q. I want to call your attention here to a bottle of liquid with a label of "California Sherry Wine" on it. Is that what you are now talking about?

A. Yes, that is the type I am talking about.

Q. The label reads, "Alcoholic content 20% by volume. Contents 4/5ths. Bottled by Fruit Industries Corporation, San Francisco. [122] Tax paid by stamps affixed to bottle for sale in California only." Was that what was on the bottles?

A. Yes.

Q. And all of them? A. Yes.

Mr. Naus: Was that 20 percent on all of them?

A. No.

Q. Just the sherry?

A. Each type has its own alcoholic content.

Mr. Naus: I didn't understand he was suggesting that there was a 20 percent alcoholic content in all the bottles.

(Testimony of Philip Elman.)

The Witness: No.

Mr. Bourquin: Q. This bottle I show you here, without going back too far, will you tell us whether or not that was of the type with stamps that Bercut Brothers forwarded to you in New York at the time you mentioned to us before you came to San Francisco?

A. Yes, that is the identical type.

Q. That is the identical type of merchandise?

A. Yes.

Q. By the way, the particular bottle which was produced here on the earlier trial, do you know where this particular one came from?

A. I think I brought that from New York.

Q. This is one you believe you brought from New York for the earlier trial? A. Yes.

Q. So we will understand this subject, did the bottles that you called our attention to showing tax paid, or stamps affixed to the case bearing the legend, "Bottled for sale in California only," did that present any problem for you and the Bercuts in working out your contract?

A. Yes and no. It meant that we would have to get Federal approval on the labels before they could be shipped out of the State.

Mr. Bourquin: May I offer this in evidence?

(The bottle of wine was marked "Plaintiff's Exhibit 8.")

Mr. Bourquin: Q. That means you had to make arrangements with the Federal Alcohol Tax Unit before you could ship it out [123] of the State?

(Testimony of Philip Elman.)

A. Yes.

Q. Did you make such arrangements?

A. Yes, definitely.

Q. What had you done in that respect?

A. Those were the F.A.A. matters, Federal Alcohol Administration, regarding the labels which we had forwarded to Washington for approval on that label that you showed me.

Q. Before you came here to San Francisco?

A. Yes.

Q. Will you tell us what arrangements or discussions, or both, you had with the Bercuts with respect to the packing and delivery of these wines during the week you mentioned?

A. We had discussions about the cartons *or* these wines. We were up to the carton people at Mr. Bercut's suggestion here in town, the Fibreboard people, talking to them about it. Mr. Peter Bercut had placed an order from the Bercut Richards Company, which is one of their fruit cannery places down in Sacramento, and in order to get cartons for his wine bottles he had to do that, because they were starting to get scarce. We asked them to submit a price for these cartons which had to be made up in different sizes, depending on the wine bottles that went into them, to quote a price, and they had sent the quotation of the prices to Sacramento and they had been sent to the Bercut-Richards place. We went down to the Bercut's Ice & Cold Storage place and viewed the storage room right alongside

(Testimony of Philip Elman.)

the outer room that was alongside the storage room, and which was piled high with cases of wine. We looked at those.

Q. You say "we". Who went down to the storage place? A. The Bercuts.

Q. Jean or Peter, or both?

A. Both of them. It was either one or the other consistently.

Q. What was your testimony with respect to the room right outside [124] the storage plant where the cases were?

A. They seemed to think it would be a good place to put in their laborers, a little room in which they could work on the bottles, label all the bottles and put them in cartons. It was close by to a car siding, so that freight cars could roll up and they could load the bottles directly from the outer room right over to the cars, without having any additional means of motivation, because it was just outside of that ice place. They said it would be the cheapest way for them to do it. We discussed the proposition of getting machinery for facilitating the packing and facilitating the labeling and getting the cartons filled.

Q. You spoke of labels. A. Yes.

Q. They were to do that? A. Yes.

Q. And pack the cases?

A. They were to pack the merchandise.

Q. Did you come to a decision, a mutual decision with respect to the use of that adjoining room for that work at their place?

(Testimony of Philip Elman.)

A. Yes. They thought it was going to be—I had offered to have a bottler re-label the wines and had made inquiry for them as to what it would cost. Mr. Bercut said, “Well, he would probably be able to do it more reasonably right here alongside of our warehouse and we can facilitate the delivery of the merchandise to the cars.” He said that it would be much too expensive to do it the way I suggested, that the most reasonable way to do it would be to do it right there.

Q. They suggested, if I understand, that instead of contracting it out they would hire the labor to do it at their own warehouse? A. Yes.

Q. Did you accept that? A. Yes.

Q. Did you have any discussion with Mr. Peter Bercut or Jean Bercut with respect to conditioning the bottles for packing and [125] shipment?

A. Yes. The bottles as they laid in the racks there were rather dusty in the warehouse. I asked them to have the bottles cleaned and polished so that they would be more presentable, and with little tissue paper, that they would present a clean appearance. He said, well, he wouldn't do that, he wouldn't clean them. He would clean them up at the top, but he wouldn't clean them all up, it was too expensive to do, that they would get dirty in the carton, anyhow. He said it would be just as well if he just took care of the tops that were real dusty and the balance was all right as put in the carton, and didn't need any tissue paper.

(Testimony of Philip Elman.)

Q. How about wrapping them, was that agreed on, too?

A. Well, it was an additional expense, too. I said to him it was a very fine product, it was a high-priced piece of merchandise and it should carry all the characteristics of a high-priced wine, a quality piece of merchandise.

Q. What was the discussion on that feature?

A. Well, they said it wasn't necessary to do that, but if you wanted to do it and stand the expense that it wasn't in the contract. You could do it if you paid for the tissue paper.

Q. What was decided?

A. We left that open.

Q. Speaking of that week again, do you recall the date at the outset of the week, Monday? What was the date of the beginning of that week, was that the 19th, a Monday?

A. Oh, yes, right around the 19th.

Q. Was the 19th a Monday?

A. I think it was.

Q. Will you tell us whether or not you carried on those discussions on the features you mentioned every day of that week, and with whom?

A. With either one of the two of them; Mr. Peter Bercut was at the ranch quite a lot during that week and he also had some litigation [126] to attend to in Sacramento. I met him once in his place of business, but most all of our business was conducted with Mr. Jean Bercut.

(Testimony of Philip Elman.)

Q. At the end of the week had there been anything set in motion, had anything been set up?

A. No, there hadn't been anything done. There was lots of discussion on it. We looked around. I looked around quite a bit. I went down to the Fibreboard people; yes, they had been asked to submit prices on cartons to Bercut-Richards, yes, they had received an order from Bercut-Richards for the cartons, and so I would tell that to Jean the following day and he would say, "I will get in touch with Pierre"; evidently he was at Sacramento or at the ranch, and we should know the following day. That went straight through that entire week; we discussed everything. We were going to get it all done and nothing seemed to be done.

Q. During that time did you encounter any rupture or did things go along smoothly, evidently?

A. Well, there were no ruptures, things went on smoothly, perfectly smoothly.

Q. Any indication during that week that they were disinclined to meet their contract?

A. No.

Q. Or that there was any difficulty, anything like that? A. No, no, not at all.

Q. During that week would you tell us, did you attend any social visits with either of the Bercut Brothers?

A. Yes. Mr. Jean Bercut invited me to his house. We had supper there, prepared a very fine supper for us. Mr. Hermann was there also. Mr. Jean

(Testimony of Philip Elman.)

Bercut took us up to Mr. Verdier's house and introduced me to Mr. Verdier, that is, Mr. Verdier of the City of Paris. We spent a very pleasant part of the evening with Mr. Verdier and his sister, Madame de Tesson, and afterwards Mr. Jean Bercut took [127] us home to the hotel. That finished that night. The following morning he picked us up again. The same thing——

Q. You speak of him picking you up. Was that rather the practice, he would pick you up in the morning and take you to the office at the Merchants Ice plant?

A. Yes. When we went down there he would do that.

Q. When you adjourned the business for the day would he drive you uptown to your hotel again?

A. Yes.

Q. And you were stopping where?

A. At the Chancellor.

Q. Mr. Elman, calling your attention to the 26th; was that a Monday? A. That's right.

Q. Did you meet with the Bercut brothers on that day and continue your conferences?

A. Yes. I went down to the Merchants Ice with Mr. Serge Hermann.

Q. How did you go that day? Did Mr. Jean or Mr. Peter pick you up, or did you go by yourselves?

A. I think Mr. Jean Bercut picked us up.

Q. Following the day's business, did he drive you back? A. Yes.

(Testimony of Philip Elman.)

Q. Going back for a moment, during the earlier week while you were discussing all of the procedure for the deal on the contract, did you and the Bercuts have any other business?

A. Yes. We were looking for some Vermouth and champagne, and we were talking about that, and during the entire week he offered me some other types of merchandise.

Q. When you say "we," did you mean Park, Benziger & Company? A. Yes.

Q. You did not do any business personally?

A. No, sir.

Q. Let me take you for a moment to the week that we have just been speaking about, had Park, Benziger & Company received any merchandise from the Bercuts? A. Yes, Chianti wine.

[128]

Q. In quantities?

A. Carloads, they had always one carload.

Q. Were those handled sight draft bill of lading?

A. Yes, they were for cash.

Q. Calling your attention to the 26th, your meeting on that day, how many of the Bercuts were there?

A. Mr. Peter Bercut and Mr. Jean Bercut.

Q. Was Mr. Hermann with you on that day?

A. Yes.

Q. On that occasion will you tell us whether or not either of the Mr. Bercuts voiced any dissatisfaction with Mr. Hermann?

A. They certainly did.

(Testimony of Philip Elman.)

Q. Will you tell us by whom and what it was; just go ahead and tell us.

A. Well, as I recall, Mr. Jean Bercut asked me to step in the office and asked Mr. Hermann to wait outside. He said, "Mr. Elman, I would like to talk to you for a few minutes; Serge, would you sit down a few minutes until I get through?" He said, "Fine." We went in and when I was in there with him he said, "Mr. Elman, I have some very bad news for you." He said, "We have inquired about Mr. Serge Hermann and find he had some business dispute here in town and we would not like to do any business with him, we would like to have our contract with you"; I said, "Well, that's fine; we are doing business together," I said, "but what is this business dispute about?" He explained the entire business dispute related to this Chateau Montelena dealing of some kind or other. So I told him then, I said, as I recall it, "I am sorry"—Oh, yes. He said, "We don't want to have anything to do with Mr. Serge Hermann because of the business deals we have heard about him." I said, "Well, the contract was assigned to Park-Benziger. You have been doing business with Park, Benziger right along and you will continue to do business with Park, Benziger," He said, "We don't want to have anything [129] to do with Hermann at all." I said, "Well, of course, that is impossible, because we have an arrangement with Mr. Hermann, but we will take care of him." I said,

(Testimony of Philip Elman.)

"We will take all the wine that we are purchasing from you." He said, "No, we don't want him to have anything at all to do with the deal." I said, "Well, we don't have anything to do——" Then Mr. Evans, who was sitting in on this——

Q. Mr. Who? A. Evans.

Q. Tell us who Mr. Evans is.

A. He is the general manager of Merchants Ice & Cold Storage, I imagine.

Q. Had he attended earlier meetings with you and the Bercuts?

A. Yes; we met him right along.

Q. You were going to tell us what he said.

A. Yes. He said something—Mr. Peter Bercut handed him a contract and Mr. Peter Bercut said to me, handing me this contract, he said, "Well, do you see anything in this contract that says Mr. Hermann has the right to assign?" I looked at the contract and I said, "Apparently there is nothing in there that says he has the right to assign." I then made the point he had the right to assign because the contract went to our lawyers in New York and we told them to look over that contract and they forwarded it back to us as being all right legally, as far as they were concerned, the deal was excellent for us. So we naturally made arrangements to have the assignment completed and so on. Then I said, "In all fairness," I said, "you ought to have Mr. Hermann come in and tell his side of the story." So Jean went out and called Mr. Hermann in and

(Testimony of Philip Elman.)

Mr. Hermann came in and they told him about what they had heard about Chateau Montelena. Mr. Hermann said he would be very glad to get in touch with some others in San Francisco who had told them about this business dispute, and who could explain any doubt [130] that they had pertaining to it, and so forth. Then Mr. Peter Bercut gave Mr. Hermann the contract and said to him, "Will you show me where this says in here that you have the right to assign that contract?" Mr. Hermann's answer was, "Will you show me where this says I haven't the right to assign the contract; you were doing business with Park-Benziger right along. What is it all about? If it has something that you do not like, why didn't you tell them about it?" He said, "You are doing business with them." He said, "Well, we want you to give us a personal release from the contract, we don't want to have anything to do with you, we want to do our business with Park, Benziger & Company; we don't want to have anything to do with you." Mr. Hermann said, "Well, if that's the way you want it, I have my agreement with Park-Benziger, it's all right with me." They said, "Yes, we want to have a personal release from you, because we want to do business with Park-Benziger; now, give us a personal release." He said, "Sure, if that's the way you feel about it it's all right with me, as long as the agreement can continue on with Park-Benziger and yourself." So we left then.

(Testimony of Philip Elman.)

Q. Did that rupture put an end to this cordial relationship that you had between you?

A. No, no, everything was smoothed out. Then, I might back up there a moment, Serge said it was all right with him, he was going to give them the release they wanted for the purpose of facilitating the deal.

Q. In that conference that day was there discussed any question as to the acceptance of the contract?

A. Yes.

Q. Was that on the question of the right to assign?

A. Yes.

Q. Tell us what was said with respect to that?

A. When the contract was shown to me I said, "Well, it has a top sheet that this contract has not got." So Mr. Peter Bercut asked Mr. Evans, [131] "Where is the top sheet?" Mr. Evans said to Mr. Peter Bercut, "I have no copy of that sheet." I said, "Well, I have the original contract with me with that top sheet at my hotel and you can see it if you want to."

Q. How did you leave the business on that day?

A. Very friendly.

Q. Did you have transportation, or did the Bercuts take you home?

A. The Bercuts took us.

Q. Who took you?

A. Mr. Bercut took us up to the hotel.

Q. Mr. Jean?

A. Mr. Jean Bercut.

Q. You say he took you. Did Mr. Hermann go along?

A. Yes.

(Testimony of Philip Elman.)

Q. The following day did he return to the hotel? That would be the 26th.

A. It was around 2:00 o'clock in the afternoon.

Q. Did he speak with you when he left you at the hotel, or did he just drop you and go on?

A. No. Mr. Bercut—after we had broken up and went outside, Mr. Bercut asked me to step into the warehouse a moment, and he said, “It’s all right as far as Hermann is concerned, as long as he has signed the release——”

The Court: When was that?

A. That was after we had broken up on that Monday. It was before Mr. Bercut was taking us up——

The Court: I thought you said Mr. Bercut also took you to the hotel.

A. Yes, I did. It was——

Mr. Bourquin: He is evidently doubling back, your Honor.

The Court: Yes.

Mr. Bourquin: But unless it is confusing I would like to cover that subject later.

The Court: Well, it is confusing.

Mr. Bourquin: I will come back to that.

Q. Mr. Elman, would you go ahead with the question I asked you, whether Jean Bercut dropped you at the hotel and went away or did he speak with you at the hotel?

A. He stopped with us at the [132] hotel.

Q. What transpired on his stop at the hotel that afternoon?

(Testimony of Philip Elman.)

A. We went up to the room and I showed him the contract that he had asked to see, the one which I had discussed. I said I had this with me from New York with the top sheet on it. I showed it to him. He asked me whether he could show it to Peter. I said, "Certainly, you can," and he took it with him and went down—before he left he said, "Well, I'll be back around five o'clock and will see you then and we will go up to the house for supper again." I said, "Fine." About five o'clock he came back and we went up to his house for supper that evening.

Q. Did Mr. Hermann go, too? A. Yes.

Q. You spent the evening there?

A. Yes, we spent the evening at his house and Mrs. Bercut was home that evening and we danced.

Q. To get back, then, when this meeting of the 26th had broken up did you and Jean Bercut have any further discussion between yourselves about Mr. Hermann or his part in the matter? A. Yes.

Q. What was that?

A. As we went out of the office, Mr. Bercut and I and Mr. Hermann, he was a little behind us there, and Jean said, "Wil you come into the warehouse a moment, I want to show you some wine?"

Q. Is Jean, Jean Bercut?

A. Jean Bercut, yes. He said, "I want to show you some wine." As we went into the warehouse he said, "What I really wanted to tell you, Mr. Elman, is, it's all right as far as Hermann is concerned,

(Testimony of Philip Elman.)

you can pay him if you want to, but we will want a personal release from him." I said, "He agreed to give it to you; it doesn't affect us, we have a contract with you, so it's all right."

Q. The following day, that would be the 27th——

A. Yes. [133]

Q. The following day did you meet again with the Bercuts at the office of the Merchants Ice & Cold Storage?

A. Yes.

Q. Mr. Hermann there, too?

A. Yes, he was there.

Q. How many Mr. Bercuts were there that morning?

A. Both Mr. Bercuts were there that morning, and Mr. Evans.

Q. Was Mr. Evans there also?

A. Yes, he was.

Q. He was the accountant or manager there?

A. Yes.

Q. Just tell us the subject of your conference there, what transpired.

A. Well, that morning I came in I handed Mr. Evans an order which I had received from the mail, or in the mail, pertaining to the final shipment of another quantity of wine, and I laid it on the, on his desk, and told him to expedite the shipment on that. On the table as we came in were quite a number of copies of papers, it was a release. Mr. Peter Bercut was sitting down there. Mr. Jean brought us in and Mr. Evans handed Mr. Hermann these

(Testimony of Philip Elman.)

papers and said, "This is the release we made up for you."

Q. Handing it to whom?

A. Handing it to Mr. Hermann.

Q. Had it been shown to you, Mr. Elman?

A. No.

Q. He just handed it to Mr. Hermann?

A. Yes.

Q. What did he say about it?

A. He said, "This is the release that we were talking about yesterday." Mr. Hermann examined it and there were some discussions there, and Mr. Hermann handed it to me and said, "Is it all right, Phil?" I looked at it and I said it was an agreement between Chateau Montelena and Serge—or P. & J. Cellars and Serge Hermann. I said, "I have nothing to do with it. Evidently that is the release that Mr. Bercut was talking about. We have a contract. I can't see any objection to it." I handed it to him and Serge signed it.

Q. By the way, at that point was any discussion made by either of [134] the Bercuts that you sign it, this document, on behalf of Park-Benziger, did they include Park-Benziger——

A. No.

Q. As the meeting adjourned, what happened?

A. Mr. Peter Bercut got up and said he had to go up to Sacramento, he had some work to do, and we could carry on with Jean Bercut and, I mean we could carry on our negotiations with Jean Bercut, our business with Jean Bercut, so Mr. Peter Bercut

(Testimony of Philip Elman.)

and Mr. Jean Bercut—Mr. Peter Bercut went out and Mr. Jean Bercut went out with Mr. Peter Bercut, and about fifteen minutes later Mr. Jean Bercut came back into the room and told me that he refused to perform this contract.

Q. What did he say, can you give us his words, the substance?

The Court: Can we stop here?

Mr. Bourquin: Yes.

The Court: Ladies and gentlemen, please keep in mind the admonition I have heretofore given you. We will be in recess until 2:00 o'clock. The jury may now retire.

(A recess was here taken until 2:00 o'clock p.m.)

[135]

Wednesday, March 14, 1944—2:00 P.M.

Philip Elman

Resumed

Direct Examination

(continued)

Mr. Bourquin: Q. Mr. Elman, I omitted to ask you this morning: Is Park, Benziger & Company a corporation organized under the laws of New York?

A. It is.

Q. It was a New York corporation at the time of the contract we are talking about here?

A. It was.

(Testimony of Philip Elman.)

Q. And still is?

A. Still is.

Q. This morning you had told us last of what transpired at the offices of the Merchants Ice, wasn't it?

A. That is right.

Q. That is where all the conferences were held—on the 27th?

A. Yes.

Q. When you said that after Mr. Jean Bercut came back to the room he told you now the contract was out and he would give you three cases; is that right?

A. That is right.

Mr. Naus: Did he say three cases?

Mr. Bourquin: I beg your pardon again. I mean three carloads. Mr. Naus asked if I meant three cases, your Honor. I am not used to handling so much wine, your Honor.

The Court: You do not buy it in carload lots.

Mr. Bourquin: Q. Will you tell us in substance what Mr. Jean Bercut said, how he put it, when he came back to the room.

A. When he told me that I said, "What do you mean?"

He said, "You don't want any contract. I will give you three carloads of wine at the contract price, and that is all."

I said, "What do you mean, three carloads of wine? We have a contract with you." [136]

He said, "Well, I will give you three carloads of wine at the contract price, and maybe later on—we will see, we will see." He said, "For cash."

(Testimony of Philip Elman.)

I said, "What do you mean? We have a contract with you for 60,000 cases of wine. Now, you have a stipulated price in there and you have the quantity of merchandise in there, and that is what the company wants to be performed."

He said, "No more contract. We don't want no more contract. I will give you three carloads of wine, and maybe later on the wine will be worth eight or nine or ten dollars to you."

I said, "What do you mean, eight or nine or ten dollars? The price in the contract is stipulated at \$5.25."

He said, "Yes, I know, I know, but just three carloads of wine."

I said, "We have a contract with you for 60,000 cases of wine at stipulated prices under certain terms. My company wants that contract performed, and that is what I am out here for."

Then I got all excited and everything and walked out of the place, I guess.

Q. Then did you leave the premises yourself and come away?

A. Yes, I went out. Mr. Hermann followed me, I guess; Mr. Bercut came out later.

Mr. Jean Bercut said, "Wait a minute, wait a minute. Don't get excited. We don't want any trouble. I will talk to Pierre when he gets back from the ranch in the morning and everything will be straightened out." He said, "Don't worry, I will straighten out everything in the morning when Pierre comes back."

(Testimony of Philip Elman.)

I said, "My God, why do you tell me that immediately when I [137] come from Los Angeles? I can't understand that kind of language?"

He said, "It is all right. I will tell you what we will do: I will get a big carload of Chianti for you; we will make up a big carload of Chianti. We haven't been able to get any glass from Mexico, but we are expecting a shipment. I know a merchant here. We will go back up to my office and call him."

I said, "All right."

Mr. Hermann and I and Mr. Jean Bercut got in the car and drove up to his office there, and on the way up he said, "Don't worry, Mr. Elman; as long as Hermann is out of the deal we will do a lot of business together. There will be a lot of merchandise for you to purchase from us. We will do a very big business. I will call up this fellow about the Chianti bottles and see if I can't get those bottles down there for you and make up a big carload of Chianti wine for you, as long as Hermann is out of the deal. Come down yourself tomorrow. Don't take Hermann with you. He isn't in the deal any more. Come down by yourself."

I said, "That is all right." After all, Hermann agreed that he was to be out of the picture so far as they were concerned. We had a contract with them. It was all right with us, and so forth. I was definitely amenable to it. I went down to the office and went back to the hotel.

(Testimony of Philip Elman.)

Mr. Hermann was waiting downstairs.

Q. You are speaking of an office. What office are you talking about?

A. The Bercut office over the Grant Market.

Q. He had driven you back to there, had he?

A. Yes, from the Merchants.

Q. You got out and had been in the office with him in the Grant Market that afternoon?

A. Yes, that is right. [138]

Q. That day did he drive you on from the Grant Market up to your hotel, or did you go by yourself?

A. I think we walked up by ourselves from there. It is only a few blocks from the Grant Market.

Q. Did you go down the next morning by yourself as he had asked you?

A. No, he said he would call me at nine o'clock the following morning—at least call for me at the hotel at nine o'clock the following morning and take me down to Bercut's, where we were going together.

Q. Did he do that?

A. No, he didn't.

Q. Did you hear from him?

A. Yes, I did. I got a telephone call at the hotel from Mrs. Bercut.

Q. Did you hear from Jean Bercut that morning?

A. Yes. Mrs. Bercut got on the phone and said, "Mr. Elman?"

(Testimony of Philip Elman.)

I said, "Yes." And we exchanged pleasantries over the phone.

She said, "Just a minute. Jean wants to talk with you."

I said, "Fine!"

Jean got on the wire. We exchanged pleasantries.

He said, "Pierre won't be back until twelve o'clock, so I won't be down to pick you up now."

So I said to him, "Well, Mr. Bercut, do you mind if I pick up"—I said, "Jean, do you mind if I pick up my contract at the office?"

He said, "Well, I gave the contract to the lawyer and I think he tore it up."

And I said, "What! He tore up the contract?"

He said, "Yes."

I said, "I see no further reason for discussion."

I banged the telephone down. I said, "I will see my [139] lawyer," and banged the telephone down, and that ended that conversation with him.

Q. On that subject, is this contract with the attached papers, the supplemental agreement and the assignment marked here Plaintiff's Exhibit 2, the same as you had loaned him the day previous on the 26th?

A. Yes, that is my contract—our contract.

The Court: Q. Where did it come from?

A. From New York, sir. I brought it with me.

Q. You said that Jean Bercut said the lawyer tore it up.

A. That is right.

Q. Where did you get it?

(Testimony of Philip Elman.)

A. He said he thought the lawyer tore it up. I don't know where this thing came from. It was brought in the court on the trial.

Mr. Naus: If the Court please, at the former trial—perhaps I can refresh his memory—that came from the possession of the defense, produced by us, and at the time of the production it was substituted for the original that first had gone into evidence.

The Court: Yes. I wanted the jury to understand. You said the contract was torn up. That is the original contract.

The Witness: That is what Mr. Bercut told me over the phone, your Honor.

Mr. Bourquin: Q. Did you see a lawyer then, Mr. Elman? A. Yes, I did.

Q. On that day, the 28th? A. Yes, sir.

Q. Whom did you see?

A. Mr. Alfred F. Breslauer.

Q. Who is one of the attorneys of record in this case? A. Yes, sir.

Q. Did you through Mr. Breslauer make a demand on these people? [140] A. We did, sir.

Q. Did you get any response from them at all?

A. None whatsoever.

Q. An action was commenced here for breach of the contract, I believe, on May—well, the record will show about May 25.

Mr. Naus: The clerk, if the Court please, may state the date of filing. We can settle that now if you wish.

(Testimony of Philip Elman.)

The Court: I haven't the papers. I think my secretary has the papers.

Mr. Bourquin: I think I have a stamp-marked "File Copy," Mr. Naus.

Mr. Naus: You were asking about the date, and I was willing to agree with you forthwith on it. I will take your statement on it.

Mr. Bourquin: May 19, 1943. Will your Honor pardon me a moment, please?

The Court: Very well.

Mr. Bourquin: Mr. Naus, I wanted to produce the demand.

Mr. Naus: I will make no objection for the limited purpose of proving the demand, not to prove any statement in it.

Mr. Bourquin: For the purpose of making the demand and for the purpose of the date that the demand was made, as it shows here, I would like to offer this in evidence.

The Court: Admitted.

Mr. Naus: It makes statements of fact.

The Court: The demand has been offered and the date of the demand.

Mr. Naus: Yes, but not the truth of any statement in it.

Mr. Bourquin: Simply confining myself to that, with your permission, Mr. Naus—— [141]

Mr. Naus: Surely.

Mr. Bourquin: I will state that this demand was one addressed to Mr. Jean Bercut on the date of

(Testimony of Philip Elman.)

April 29 demanding his contract, that being the date, and signed by Park, Benziger & Co., Inc. by Philip Elman, the vice president.

Q. Is that the demand that Mr. Breslauer prepared for you on that date?

A. That is right.

Mr. Bourquin: It will be admitted, Mr. Naus, that that demand was received that day, will it?

Mr. Naus: Oh, yes.

Mr. Bourquin: You may cross examine.

(The document was marked "Plaintiff's Exhibit 9.")

PLAINTIFF'S EXHIBIT 9

To Mr. Jean Bercut

The undersigned, Phillip Elman of Park, Benziger & Co., Inc., hereby demands of you the return of that certain agreement dated January 29, 1943 between Pierre Bercut and Jean Bercut, doing business under the firm name and style of P. & J. Cellars, therein referred to as First Party, and Serge Hermann of Chateau Montelena therein referred to as Second Party, and which said agreement was assigned to Park, Benziger & Co., Inc.

Said agreement with attached letter and assignment was handed to you at your request on Monday, April 26, 1943 at Room 802, Chancellor Hotel, San Francisco, California, upon your statement that you wished to have your brother

(Testimony of Philip Elman.)

read the same, and that you would return the document to me the following day, to wit, Tuesday, April 27th. I have made several oral requests for the return of this contract during the past several days and you have failed, neglected and refused to return it to me.

Will you please return this contract to me at the Chancellor Hotel, 433 Power Street, San Francisco, California, or to my attorney, Alfred F. Breslauer, Room 1333, One Eleven Sutter Street, San Francisco, California, immediately upon receipt of this written demand.

Dated: April 29th, 1943.

PARK, BENZIGER & CO., INC.

By PHILLIP ELMAN

Vice President

Cross Examination

Mr. Naus: Q. How soon after you slammed up the telephone, as you just illustrated to us, did you go to see Mr. Breslauer as a lawyer?

A. Within a few hours, sir.

Q. The same day? A. The same day.

Q. Did you get the demand out the same day?

A. I think so, sir. The date will establish that.

Q. The date will only establish that it is dated April 29; I am asking you if you got the demand

(Testimony of Philip Elman.)

out the same day that you slammed up the telephone on Mr. Jean Bercut.

A. Mr. Breslauer got that demand out for me, sir. I went to him immediately after that telephone conversation, within an hour or two, after I could catch my breath, and I asked him to make a demand for the return of that contract, and I told him about what had happened to me, how we had been defrauded out of the contract.

Q. I was only asking you about a date, Mr. Elman. A. All right. [142]

Q. As I understood it, you went to Mr. Breslauer on the same day that you slammed up the telephone?

A. That is right, sir.

Q. I see the demand is dated April 29, so I am asking if that is the date you went to Mr. Breslauer.

A. No, it is not.

Q. What day did you go?

A. It was the 28th, sir, the day after the 27th.

Q. The 28th? A. Yes, sir.

Mr. Bourquin: I might say, Mr. Naus, for your information on that subject. I intended with the Court's permission to call Mr. Breslauer on that one question.

Mr. Naus: Q. As I understood you to tell Mr. Bourquin this morning, you folks back in New York had some talk with Mr. Hermann about California wine before he left New York to come to San Francisco in January, 1943, is that correct?

A. That is right, sir.

(Testimony of Philip Elman.)

Q. Can you tell us about what date he left New York? He stated at the other trial, as I recall it, it was about January 5, 1943. Would that be about right?

A. No.

Q. What date did he leave New York?

A. Well, I am sorry. I say "No" advisedly. I was thinking at the moment of something else.

Q. Did you say "advisedly" or "inadvisedly"?

The Witness: May that question be read again, please?

(Question read.)

Mr. Naus: Q. Was that about the date he left New York, Mr. Elman, about January 5, 1943?

A. The first time, sir?

Q. On the occasion of the trip that brought him here and ended in making a contract January 29.

A. I imagine it was about that time.

Q. About when was it before January 5 when he left, when was it [143] you had a talk with him about finding some wine in California?

A. We were discussing the wine situation and that things were getting very scarce, and he said, "Well, I think with all my connections and my knowledge of the wine business, if I went to California I might be able to contact my friends out there or find some wines."

I said, "Well, that seems to be quite a good idea."

Mr. Naus: Mr. Reporter, will you read the question.

(Question read.)

(Testimony of Philip Elman.)

Mr. Naus: Q. Please note, Mr. Elman, I only asked you when, and you have answered everything else but that.

A. Prior to that time. I can't give you the exact time.

Q. About how long before?

A. It must have been within a week or two before, sir.

The Court: Q. A couple of weeks?

A. About a few weeks before he left.

Mr. Naus: Q. Who all had the talk with him?

A. Mr. Benziger, Mr. Hermann was in the office, and myself.

Q. You, Mr. Benziger and Mr. Hermann?

A. That is right.

Q. You have told us what he said about a proposed trip out here. What, if anything did you folks say?

A. We said we were very much interested in buying wines, and if he found anything that had any value to it, we would be very much interested in it, because we wanted to find something with a good agency that we could continue on, on a domestic wine basis.

Q. Was anything said at that conversation about Hermann coming out here and looking for wine, and if he could find any, to bring it to you in preference to someone else?

A. No, he said if he found anything out here would we be [144] interested. We said yes.

(Testimony of Philip Elman.)

Q. When did you next hear from him?

A. We heard from him by telegram after he had been out here for some time.

Q. This telegram that was produced this morning?

A. Yes, sir.

Q. This telegram of February 2. That is addressed to you care of Park, Benziger & Company?

A. That is right.

Q. It says, "Suggest you phone me on receipt of this wire." Did you do it?

A. No, I did not.

Q. Did you write to him?

A. Yes, I believe I wrote to him.

Q. Shortly after receiving the telegram?

A. Yes.

Mr. Naus: I ask the production of the copy of the letter or the original of Hermann's. Have you got that, counsel?

Mr. Bourquin: We will make a search, counsel, and see if we have. We will see if we can find it. I would suggest that you proceed.

Mr. Naus: I would prefer the letter at this time if it is available, so I can proceed with the examination upon it.

Mr. Bourquin: I have to give these things to Mrs. Herzig, because I am not familiar with them.

Mr. Naus: I might say, if the Court please, I had not known of this telegram until this morning. It was not mentioned at the former trial; otherwise

(Testimony of Philip Elman.)

I would have made other arrangements about it and not held up anything.

The Court: I understand. I remember it was not mentioned at the former trial.

Mr. Bourquin: Mrs. Herzig, I might say, has not got a letter. She gives me a telegram. Would that tie in, Mr. Naus—February 8?

Mr. Naus: Q. I will hand you what I take for granted on this exchange is your first response; am I correct in that [145] assumption?

A. Maybe, sir.

Q. Is it your best recollection or not that that is your first response?

A. It is my best recollection it may be the first response.

Mr. Naus: I offer it.

The Court: It may be admitted.

(The telegram was marked "Defendants' Exhibit A.")

The Court: What is the date of it?

Mr. Naus: February 8, 1943.

Q. By the way, Mr. Elman, I notice the place it is sent from is not indicated. Did that come from New York, sent from New York?

A. Yes, sir.

Mr. Naus: (reading): From New York, February 8, 1943.

(Testimony of Philip Elman.)

DEFENDANTS' EXHIBIT A

"Mr. Serge Hermann

Alexandria Hotel

Los Angeles, California

Congratulations. Deal looks excellent. Am awaiting samples. Airmailing letter to you to-night.

PHILIP ELMAN,

Park, Benziger & Co., Inc."

Q. Pursuant to that telegram did you send him an air mail letter that same night?

A. No, I think it was within a matter of a few days, I believe.

Q. One was sent, was it?

A. I think so.

Mr. Naus: I ask for the production of it.

Mr. Bourquin: Mrs. Herzig says she has not a copy of the letter, Mr. Naus.

Mr. Naus: Q. Where is the letter, Mr. Elman?

A. I don't know, sir. It must be back in our files if it was sent.

Q. If it was sent. Are you in doubt whether you sent a letter? [146]

A. We had a telephone conversation, as best I can recall on the matter, while Mr. Hermann was here. He was quite enthusiastic about it. He might have phoned. As a matter of fact, I think he did phone once on it.

(Testimony of Philip Elman.)

Mr. Naus: I ask leave, if the Court please, to file the original of a notice to produce served by us upon counsel for the plaintiff with admission of service by Mr. Breslauer on March 4, 1944, just to establish that.

(To Mr. Breslauer): Mr. Breslauer, that was served on you, and the call No. 9 in this notice to produce reads: "All correspondence between the plaintiff and Serge Hermann with relation to any transaction with the defendants Bercut relating to wine," and so on.

Mr. Bourquin: Don't you think you had better address that to Mrs. Herzig or me so we can answer it orderly?

Mr. Naus: I will address it to all of you. Gentlemen and lady, did you pursuant to this notice to produce search for the documents called for, and are you prepared to say whether they exist or not?

Mrs. Herzig: Yes, we did try to obtain all the documents which you listed, Mr. Naus. Unfortunately, the parties had already left New York and they brought with them only such things as they thought were relevant.

Mr. Naus: I will pass that for the moment.

Q. Mr. Elman, as you sit there have you or not any recollection whether, before Mr. Hermann's return to New York, which I understood you this morning to say landed him there February 15, did you or not write any letter to him? Have you any recollection? A. I believe I did.

(Testimony of Philip Elman.)

Q. And that letter, if in existence anywhere now, is in New York [147] and not in San Francisco; is that correct?

A. It probably is. I brought out quite a bit of things that were in the files. It is there or in our attorneys' files. I don't recall every letter that was brought out.

Q. They tell me now it is not in the files in their possession. You say you turned everything over to them, so we can assume it is now in New York?

A. We may assume that.

Q. What did you say to him in it?

A. I beg your pardon?

Q. What did you say to him in it?

A. I don't recall what the letter said.

Q. Could you recall any part of the substance of anything you said to Hermann in that letter we are talking about?

A. No, sir, not without first seeing it—if there was a letter that I wrote.

Q. If there was one. Did you receive any letter from him between February 2 and February 15 of 1943?

A. We may have; I don't remember.

Mr. Naus: I ask the production of such a document.

Mrs. Herzig: No, I do not find the letter at that time.

Mr. Naus: Q. Then you do not know at the moment whether one was ever received from him or not?

A. That is right.

(Testimony of Philip Elman.)

Q. In this telegram from him, Plaintiff's Exhibit No. 1, he says, "Have definitely completed the finest bottle deal dreamed of." As between you gentlemen in the wine business, what does a "bottle deal" mean?

A. Well, it was clarified to us—I mean, after he had completed the deal—that this merchandise was racked and stored in a warehouse. A bottle deal meant it was bottled and not in bulk. There is a differentiation between purchases and sales in bulk and that in bottles. That is evidently what is referred to in here. [148]

Q. It went on—on February you received this: "The finest bottle deal dreamed of." You understood him to refer to wine in bottles? A. Yes.

Q. As I understand it, he arrived back in New York about February 15; am I correct in that?

A. That is right, sir.

Q. 1943? A. Yes.

Q. And called at your office, did he, and went over the deal with you? A. He did.

Q. Who were present?

A. Mr. Benziger and myself.

Q. You, Mr. Benziger and Mr. Hermann?

A. Yes, sir.

Q. State the substance of what was said.

A. Well, Mr. Hermann came into the office and showed us the contracts and said, "What do you think of the deal?"

(Testimony of Philip Elman.)

We read it over and said, "We really think you have something there that nobody else in this country has been able to get."

Then we discussed it. We said, "Well, we will have to send it over to our lawyers and see how it shapes up from that particular aspect of it." We were satisfied in so far as the quality of the merchandise was concerned by what the contract had in it, by what Mr. Hermann had told us, by virtue of the fact that these wines were stored and racked and they had 27,000 cases of merchandise in the warehouse already prepared and labeled and ready to be shipped. And we discussed at that time the advisability of taking it. We wanted it. It was a good contract. We said, "If everything shapes up all right, just send it over to the lawyers' for o.k. and we will take it."

Q. When did you tell him definitely you would take it?

A. After we saw the contract we said, "Whatever comes back from the lawyers is all right."

[149]

Q. I think you misunderstand me. I don't know when it came back from the lawyers. I wasn't there. When did you tell him definitely you would take it?

A. At that time.

Mr. Bourquin: I think he has answered the question, your Honor.

The Court: Overruled.

(Testimony of Philip Elman.)

Mr. Naus: Q. I do not think you quite understand me. You told him on February 15 you were going to submit the matter to some lawyers?

A. I told him we would take it if the lawyers found it all right.

Q. When? When? A. That date.

Q. Did you get word from the lawyers on the same day, too?

A. It was within a day or so, as I recall.

Q. What I am trying to find out, Was it on February 15 or not, after getting word from the lawyers, you told Hermann you would take the deal?

A. Yes, it could have been, because he came back a little sooner than that, as I recall it. We discussed the matter of the contract with him a little before that. I think he came in two or three days before the 15th, and it was definitely decided we wanted it on the 15th, and we all agreed we would take it. We were all in the office there, and we said, "O.K., Mr. Hermann, we will take this contract over."

Q. Was anything drawn up in writing at that time? A. With reference to what, sir?

Q. With reference to taking over the contract from Mr. Hermann. A. No.

Q. Why not?

A. It was an oral acceptance to him. He was perfectly satisfied with it.

Q. Then what in substance were the terms on

(Testimony of Philip Elman.)

which you told Hermann orally that you would take it over? [150]

A. We discussed the matter thoroughly with him and we agreed to take over the contract and give him fifty per cent commission of the net profits on the sale of the merchandise.

Q. What did he agree to do?

A. Well, he agreed to sell us the contract for that.

Q. Was anything said about Hermann giving his time to selling the wine after you got it?

A. Yes, he asked us whether we would like to have him promote and sell the wines, and we said, "Yes, it might be a very good idea," since he knew, I thought, a lot more about the actual wines than we did at that time. I hadn't seen them. He seemed to know the people quite well, thought very highly of them, and he asked us whether we would like to do that, discuss that point, and we said, "Yes," and we decided he was to become an employee of Park, Benziger & Company as our salesman to sponsor the wine and sell it and promote it, help in it in every way he could.

Q. You said he was to become your employee. Was he to become a full-time employee and sell this Bercut wine?

A. A salesman for us to sell the Bercut wine.

Q. My question goes further: Was he a full-time employee or salesman for you selling the Bercut wine?

A. Yes, I imagine so.

(Testimony of Philip Elman.)

Q. Let us not imagine. You were present when the deal was made. Tell us whether that was the arrangement or not.

A. That was my impression of it, sir.

Q. I beg your pardon?

A. That was my impression of it.

Q. You were present? A. I was.

Q. You participated in the talk, didn't you?

A. That is right.

Q. And you heard everything Hermann said?

A. Yes. [151]

Q. Everything that you folks demanded?

A. That is right.

Q. Was the arrangement or not that he was to give his full time to selling the wine after you got it from the Bercuts?

A. Yes, he would give his full time to it.

Mr. Naus: This morning, Mr. Bourquin, it was understood that as to this Plaintiff's Exhibit 4 that went in this morning, Mrs. Herzig by two o'clock was to ascertain whether you have the original. Have you it?

Mr. Bourquin: No, we do not have that.

Mr. Naus: Q. This went in in the course of your testimony, Mr. Elman, Plaintiff's Exhibit 4 (handing document to witness).

A. That is right.

Q. That seems to be on the letterhead and dated February 25, 1943. A. That is right.

(Testimony of Philip Elman.)

Q. Is that a writing confirmatory of the oral arrangement of February 15? A. Yes.

Q. Before going on with this, after you completed your deal orally why did you change your mind a few days afterwards and put it in writing?

A. It was a natural course of events with us. We complete deals orally and later on they are taken out and written up.

Q. In other words, the explanation is, as I understand it, that is according to the natural course of events in the New York office of Park, Benziger & Company; have I got it right now?

A. I think so.

Q. As part of the natural course of events there was another writing on the same day, wasn't there? That is the top paper on this Plaintiff's Exhibit 2 in the nature of an assignment from Chateau Montelena of New York to Park, Benziger & Company; is that correct?

A. That is the time we reduced all these [152] things to writing. That is right, sir.

Q. Let us see if we have all these things. Are the two writings before you, that is to say, the fifty per cent arrangement with Hermann in one paper and the assignment from Chateau Montelena of New York to Park Benziger & Company in another paper—do those two papers comprise the whole?

A. The whole of what, sir?

Q. The whole of your arrangement as it was reduced to writing? There may be three or four

(Testimony of Philip Elman.)

more papers, so far as I know. I am trying to find out. A. I think so.

Q. Those two papers are the whole arrangement, are they? A. I think so.

Q. Do the two of them together depart in any way from the oral arrangement, or do they state the substance of the oral arrangement in writing?

A. I think they state it.

Q. There was no change?

A. I don't think so.

Q. I notice in the assignment it says, "As per our agreement we hereby assign to you the agreement and all our rights thereunder." Did Park, Benziger & Company ever at any time in any writing assume or agree to buy the wine from the Bercuts? A. What is that?

Mr. Bourquin: What is that question?

(Question read.)

A. I think so, and the fact that we had told Mr. Hermann on February 15 to write the Bercuts and tell them we were taking the contract.

Mr. Naus: Q. Returning to my question for a moment, I am trying to find out whether or not there ever was in writing——

A. That is a writing.

Q. I am not finished. (continuing) ——whether there ever was in [153] writing as between you folks on *the hand* and Hermann or Chateau Montelena of New York on the other a written assumption or agreement on the part of Park, Benziger

(Testimony of Philip Elman.)

to perform Hermann's obligation under the Bercut contract, that is to say, to buy the wine.

A. Well, Mr. Hermann's letter told Bercut that we had taken over the contract. You mean a notice of an assignment?

Q. See if I can cover it this way: When you say Mr. Hermann's letter, is or is not the letter that you refer to the one that has been marked by the clerk here this morning as Plaintiff's Exhibit 3?

A. That is it.

Q. That is the one signed "Serge," isn't it?

A. That is right, sir.

Q. Has there ever been any writing on which Park, Benziger's signature can be found in which Park, Benziger & Company ever agreed in writing to buy anything from anybody?

A. I don't know what you would think of it. Here Serge wrote the letter on Park, Benziger's stationery, and the letter contains the information stating it is being turned over and that he turned it over to us. That is about the only one I know of, sir.

Q. If we all read this letter of February 15 that we have in our hands here, Plaintiff's Exhibit 3, we will then have the full extent of anything that was written on this subject by Park, Benziger agreeing to buy wine, will we?

A. Also a few other letters which have been written after that date to the Bercuts, and I guess you will have it.

(Testimony of Philip Elman.)

Q. I am asking only about writings over the signature of Park, Benziger & Company in which they promised to buy wine or agreed to buy wine or assert the obligation of Chateau Montelena of New York to buy wine. I am trying to find out if there is any [154] writing of that nature. Can you tell me if there is or not?

A. I don't know in that respect. There has been correspondence back and forth between the Bercuts and ourselves in which we had purchased several thousand cases of Chianti wine before there was ever any shipment of Bercut, P. & J. wines, which we bought from them.

Q. Those Chianti wines simply took the form of a written order: they were simply orders on open account, weren't they, without previous written contract between the parties?

A. Well, Mr. Hermann offered them to us when we came back to New York. He said the Bercuts had certain wines for sale. We bought them and sent out the orders to them.

Q. For example, like was annexed to this letter of February 15, there was attached to it one paper called Order No. 1?

A. That is right.

Q. Another Order No. 2?

A. That is right.

Q. Hermann simply sent along with his letter to the Bercuts two orders on open account, or two open orders from Park, Benziger & Company to the Bercuts to ship some Chianti; is that correct?

(Testimony of Philip Elman.)

A. That is right. Those are orders we made up buying wine which he offered us.

Q. That Chianti had nothing to do with the wine in the contract between Chateau Montelena of New York and the Bercuts? A. That is right.

Q. It was outside of that? A. Yes.

Q. When Hermann first left New York somewhere in the early part of January, which we are assuming was around January 5, 1943, he left on his own account and at his own expense, didn't he?

A. That is right, sir.

Q. It was a matter of his own?

A. Yes, sir. [155]

Q. Park, Benziger did not promote that trip or put up any money, did they? A. No, sir.

Q. That was solely and entirely a promotion of Hermann's own, wasn't it? A. Yes, sir.

Q. Later on, shortly preceding your trip to San Francisco, which landed you here somewhere around the middle of April 1943—shortly preceding that Hermann had come out here again, hadn't he?

A. Yes, sir.

Q. Was that second trip of his that landed him ahead of you here in April also at his own expense?

A. That is right.

Q. A matter of his own—correct? A. Yes.

Q. Incidentally, in that fifty per cent arrangement you had with him, first orally and later in writing, Hermann going around selling was to be at his own expense, wasn't it? A. That is right.

(Testimony of Philip Elman.)

Q. Any and every expense, of whatever nature, he may have incurred from the beginning, January 1943, down to the present time has been an expense of his own? A. That is right.

Q. And is directed solely by him so far as Park, Benziger is concerned towards Hermann's attempt to make fifty per cent of the wine deal?

A. I don't quite understand that question.

Mr. Naus: May I have it read?

(Question read.)

Mr. Bourquin: I object to that, your Honor, as argumentative.

The Court: Reframe it.

Mr. Naus: Q. Mr. Elman, as I understand it, whatever personal expense Hermann was put to running around over railroads, in hotels, undertaking this, that or the other thing, in getting a wine contract with the Bercuts in the first place, and then [156] thereafter going around and finding customers for Park, Benziger & Company to buy the wine from Park, Benziger & Company—every expense of every nature that he was put to was his own expense?

A. That is very confusing, sir, because we had an arrangement with him on commission where whatever monies he spent in the promotion, towards the promotion of the Bercut wines was spent of his own account and not ours. He was to get fifty per cent of our net profits after our deductions for

(Testimony of Philip Elman.)

various other—for various expense of the business taken off.

Q. After your deductions on everything excepting Hermann's fifty per cent, isn't that correct?

A. No, no. Wait a minute. That is rather confusing.

Q. I will reframe it.

A. We gave Mr. Hermann a fifty per cent net commission on the sale of the Bercut wines. That was the arrangement. Now, in so far as expenses are concerned, after we took the contract and he came to work for us as a salesman to promote the wines in that deal, then the monies that he spent in the promotion for it was for his own account.

Q. Yes. A. That is right, after that.

Q. Yes, for his own account. Now, you gave Hermann fifty per cent of an amount that was to be arrived at how?

A. After the deduction of freight and the costs involved in the marketing of the wine.

Q. Well, let's see. You take the price paid to the Bercuts? A. That is right.

Q. You take your transportation charge or landed cost in New York? A. That is right.

Q. And then to those items you would add some others? A. That is right. [157]

Q. And having got through with that you would subtract it from your sales proceeds?

A. That is right.

(Testimony of Philip Elman.)

Q. What all would you add to the price of the Bercuts, to the freight or landing cost in New York, before you found out what sum there was, if any, for Hermann's fifty per cent to operate on? That is what I am trying to get at.

A. Do you mean the items of cost that entered into it?

Q. I have never been connected with Park, Ben-ziger & Company. I am only trying to find out from you who participated in that deal, if there ever were any profits to be divided up, how you were to arrive at the amount that you were finally to divide by two and give Hermann half of it. Whatever it was, you would have to tell me what it was. I can't answer any questions for you.

A. The actual expenses involved in the sale of the wine, the net proceeds were to be—fifty per cent of which was to be given to Mr. Hermann.

Q. What were those actual expenses to consist of?

A. Your freight from Los Angeles—from San Francisco to New York is a deductible item off the sales price; the warehousing in New York and overhead in New York for the sale of that wine, which would range about six per cent of the retail business, and that is about the figures. Then we would detract the cost of the wine from that. You would have the difference, the net profit.

Q. As I understood some of your answers, you are suggesting, at least, that Hermann was simply

(Testimony of Philip Elman.)

an employee or was to be an employee or commission salesman for Park, Benziger & Company?

A. That is right, in the sale of these wines.

Q. Yes, and I assume if that were so, that whatever you paid Hermann, whether you call it fifty per cent or not, would simply [158] be selling expense of your own—selling expense of Park, Benziger & Company, wouldn't it?

Mr. Bourquin: Your Honor, I object to this as argumentative.

The Court: It seems to me it is argumentative.

Mr. Naus: I will withdraw it, then, because I do not wish it to be.

Q. Now, Mr. Elman, tell me: You say that you finally got an artist, a printer and what-not, and prepared some labels? A. That is right.

Q. I understand, of course, under the contract you folks were to furnish the labels?

A. Yes, sir.

Q. Didn't you have any label that you had used before you ever heard of the Bercuts?

A. Oh, we have many labels that we have used. We have been in the business since repeal. We have used many thousands of labels. We have sales agencies for brands in this country of Scotch whisky, French cognac, French champagnes, French wines, Hungarian brandy. We have other labels.

Q. Have you any label that you had ever used for a domestic wine?

A. No. We created that label for our domestic

(Testimony of Philip Elman.)

wine business—I mean specifically for the Bercut lot.

Q. Prior to the Bercut deal did you have any domestic wine business?

A. Oh, yes, a little bit; not very much.

Q. What does “a little bit, not very much” mean?

A. Some bulk sales and some cased goods sales, but they were in small quantities and they weren’t anything based on a real wine agency such as we have in other merchandise.

Q. Passing the bulk sales to one side, what would you say was the aggregate volume of labeled or bottled California wine that [159] Park, Benziger had ever handled before this Bercut deal?

A. Oh, it wouldn’t run into very much, sir.

Q. If you will only tell me how much, we will pass to something else.

A. Yes. I don’t know exactly how much it would be, because those figures will have to be compiled by our accountants.

Q. What would be your estimate of the limit of it?

A. Around 15,000, 20,000, maybe 25,000.

Q. What? A. Dollars.

Q. Dollars? A. Worth of wine.

Q. I did not know whether you meant dollars, cases, bottles, or what.

A. You said the limit of the amount of money spent for the purchase.

(Testimony of Philip Elman.)

Q. What would you say was the aggregate number of cases of wine that you had ever handled, California wine, the still wine, before the Bercut deal?

A. Bottled, do you mean?

Q. Yes.

A. Case goods? I would say around 5,000 cases.

Q. That had been over what period?

A. I might be wrong on that, sir. I recall now we did have some merchandise which we had bought in cased goods from a California shipper down south, who was a bottler. It might have run into a little more—probably eight or nine thousand, 10,000.

Q. My immediate question was that total was spread over what period of time?

A. Oh, I would say it was over a year—a period of about a year—yes, 1942, I think. That is about the time we started to buy California wine, because our French stocks had been depleted, and we had our customers coming in constantly asking us if we could purchase wines for them, you see.

Q. Was any of this California still wine that you are speaking of ever put out before the Bercut deal under your own label?

A. No. [160]

Mr. Naus: As I understand it, Mr. Elman, this wine involved in that Bercut deal that Hermann dug up for you was the initiation of a new line of business in your company, wasn't it?

A. A new line?

Q. That is to say, having to do with California still wines under your own label.

A. Yes.

(Testimony of Philip Elman.)

Q. And developing a market for them, wasn't it?

A. The question of developing a market for them, the market had already existed. We had customers coming into the office for a period of a year asking us about good wines that were becoming very scarce, and knowing that anything we put out were of good quality they were interested in having us buy wine for them.

Q. You spoke on the matter of Mr. Hermann's license. The license that was referred to in the evidence this morning is called a salesman's license, a solicitor's license? A. Yes.

Q. A solicitor can operate under a solicitor's license only when he is connected with someone who has a different kind of license?

A. That's right.

Q. What is that different kind of license called, Mr. Elman? A. Wholesaler's.

Q. Wholesaler's?

A. Well, it can be either wholesaler's—

Q. Chateau Montelena of New York had a wholesaler's license for a while, too, didn't it?

A. Yes.

Q. Prior to the transfer of Hermann's solicitor's license to you his solicitor's license had been under the wholesaler's license held by Chateau Montelena, of New York? A. Yes, sir.

Q. That wholesaler's license of Chateau Montelena of New York expired February 28, 1943, didn't it? A. It did.

(Testimony of Philip Elman.)

Q. Neither Serge Hermann nor Chateau Montelena of New York, nor Mrs. Serge Hermann, who was the owner of Chateau Montelena of New [161] York, have ever had a wholesaler's license since February 28, 1943, have they?

A. Yes; they renewed it this year.

Q. Are you sure? Have you seen it?

A. I think so.

Q. Do you know?

A. Mr. Hermann told me that he had renewed his license.

Q. Wholesaler's license? A. Yes.

Q. When did he tell you that?

A. It was prior to coming here, I guess.

Q. Well, you have come here two or three times. When did he tell you that?

A. Prior to this trip, I mean.

Q. Well, about what date? Maybe we can get it more quickly and pass to something else if I ask you what date. A. Before we left.

Q. When was that?

A. After the time we left. I mean, let me see now, within the last two weeks.

Q. Where did he tell you that he had renewed his wholesaler's license?

A. As I recall it, he told me he was renewing, or making application, at least, the Chateau Montelena was getting their license back.

Q. Where did he tell you that?

A. I think that was in New York, sir.

(Testimony of Philip Elman.)

Q. Who else was present?

A. I don't recall at the time. It was a conversation between ourselves.

Q. Then did he tell you that he had renewed it, or that he was going to renew it?

A. He told me Chateau Montelena was renewing their license, was renewing their license, and he expected to get it.

Q. I will return to my original question: Can you tell me whether at any time since February 28, 1943, Chateau Montelena of New York, or Mrs. Serge Hermann, or Serge Hermann, have had any [162] wholesale license in the State of New York, one that was actually issued and in existence?

A. I think so.

Q. You think so. I am saying do you know that they did? A. Yes, I know they did.

Q. But you base your knowledge simply on what Hermann has told you, is that correct, what Serge Hermann has told you?

A. Well, as a matter of fact—yes, on what he has told me, that he has a license and he is operating on that. I think he showed me a photostatic copy of that license here in San Francisco.

Q. That was in the last few days? A. Yes.

Q. Whatever you have testified to in this regard, you are relying simply on what Serge Hermann told you or showed you? A. Yes.

Q. And nothing more than that? A. Yes.

Q. It is based on nothing else, is it?

(Testimony of Philip Elman.)

A. Nothing else.

Q. By the way, up to April 27, 1943, had Park, Benziger & Company ever given to the Bercuts any shipping instructions for any of the wines covered by the contract?

A. Yes. We requested a case of each of the different types of wine in the contract to be sent to us.

Q. Those were the original samples, weren't they?

A. No, they weren't. That was subsequent to receiving the two cases of samples from them.

Q. You say, then, that some of the wine under this contract has been delivered to you?

A. They were not delivered.

Q. What shipping instructions have you ever given to the Bercuts with respect to any of the wines covered by the contract?

A. We asked them to ship us a case of each of these types of wine that were in the contract that he had in his warehouse.

Q. That is about half a dozen cases?

A. Six cases; six cases to be used as samples.

[163]

Q. Aside from those six cases of samples has Park, Benziger & Company at any time given the Bercuts any shipping instructions on any of the wines covered by the contract?

A. No, except when I came out here I was instructed by the company to make arrangements for

(Testimony of Philip Elman.)

the first carload of merchandise to be got out of San Francisco as soon as possible, and that the car was to consist of as many cases as the Bercuts would permit us to take into the car. The ODT regulations at that time had variations in available rolling stock. You might be allowed 1500 cases or 1800 cases, but whatever the railroad delivered to Bercuts they had to bill——

Q. You see the difficulty, your Honor. Mr. Elman, you have been relating something that I did not inquire about. All my question relates to is whether Park, Benziger & Company ever gave to the Bercuts any shipping instructions, aside from these samples. A. Through me.

Q. Did you give them the instructions on a car?

A. Yes; I came out to tell them that we would like to facilitate the shipment of the merchandise and we wanted to get it as quickly as possible.

Q. Tell me whom you told them to ship it to, how many cars of each type and where to ship it?

A. Well, I told them that we wanted to get the first car out as quickly as possible to New York.

Q. I am pressing to find out what you ever gave them in the way of specific instructions to ship a carload of such and such type, or so many cases, or what-not, to John Smith at Baltimore, or any specific shipping instructions; did you or not?

A. I didn't give them anything in writing, if that is what you mean. It was done orally.

Q. I mean orally or in writing.

(Testimony of Philip Elman.)

A. Orally, on their contract.

Mr. Bourquin: I think if Mr. Naus will examine that contract [164] he will see his people agreed to——

The Court: This is cross examination. Objection overruled.

Mr. Naus: May I now have an answer?

The Witness: To which question?

Q. Did you ever, orally or in writing, or in any manner, or any combination of manners, ever give to the Bercuts any specific shipping instructions for the shipment of this wine covered by this contract to anybody?

A. The only thing that I had done was to tell the Bercuts that we were very anxious to get the first carload of merchandise ready. There was no merchandise ready. The cases were not labeled. The cartons were not made yet, so how could I tell them where to ship it, other than that we were very anxious to get the first carload ready and out to New York.

Q. I am afraid we are going to get into an argument in a moment. What I want to know is, did you ever tell them to ship to John Smith 100 cases when the label was ready? The answer is that you never gave them specific instructions to ship any particular wine to any particular person at any particular address; is that not a fact?

A. Well, let's not get into an argument.

The Court: No, no.

(Testimony of Philip Elman.)

The Witness: Those are the instructions I gave them.

The Court: No. Read back there several answers of this witness.

(The record was read as follows: "The only thing that I had done was to tell the Bercuts that we were very anxious to get the first carload of merchandise ready. There was no merchandise ready. The cases were not labeled.")

The Court: That is all you did, isn't it?

The Witness: Yes.

The Court: Let's have a recess for five minutes.

[165]

(Recess.)

The Court: You may proceed.

Mr. Naus: Q. Mr. Elman, I understood you to testify earlier today that in the course of some one or more of these discussions you had with one or the other of the Bercuts something was said about cleaning and polishing the bottles and putting tissue paper on them. A. Yes.

Q. Did I understand you correctly to state as to the matter of the tissue paper and the like that "We left that open more or less"? What do you mean by that?

A. I said, "It is only a matter of a few pennies; if you don't do it I will, so what's the difference?" Then we left it open.

Q. You mean you left it open as to who would pay for it?

(Testimony of Philip Elman.)

A. No. I said I would pay for it if they didn't.

Q. Did you leave it open as to whether it was to do done?

A. Yes. If he didn't want to put them on, it was a matter of a few pennies a case, why I told him I would.

Q. A matter of a few what, per case?

A. A few pennies.

Q. Well, how much would these few pennies amount to, do you know?

A. I don't know off-hand, but I would think it would amount to around 3 or 4 cents a case for the paper, 12 bottles in a case.

Q. Do you know what the handling and washing would amount to per case, for washing bottles and wrapping them in tissue paper and buying the paper?

A. I wouldn't know, sir.

Q. You said something earlier about the availability or nonavailability of wines from the 1st of January, 1943 down to the present date. Could this line of Bercut wines be duplicated in the country?

A. Not to my knowledge.

Q. The fact is it could not be; isn't that the fact?

A. Yes.

The Court: What? [166]

The Witness: I said no, it could not be duplicated.

Mr. Naus: Q. You said something this morning about the big liquor and winery distributors,

(Testimony of Philip Elman.)

like Schenley and others buying up bulk wines in California.

A. Correct.

Q. That began back sometime in 1942?

A. In 1942.

Q. Prior to that time much of California wines went East in bulk in tank cars to Eastern bottlers didn't they?

A. Yes.

Q. After the distilleries bought up the stock the Eastern bottlers went out of business, didn't they, pretty much?

A. Quite a number of them did.

Q. As a matter of fact, could either you or Mr. Hermann or Mrs. Hermann, or Chateau Montelena of New York at any time since January 29, 1943, have bought an equivalent amount of California still wines in the market anywhere, regardless of ageing or bottling or racking?

A. I don't think we could.

Q. You say you don't think you could. You are in touch with the market, aren't you?

A. Well, we are never in touch with the domestic market to that point of where we could place a finger on a broker and say we could buy a particular wine from him, because we have never been in the domestic wine business.

Q. As a matter of fact, this was a brand new venture of yours, wasn't it, the Park, Benziger & Company?

A. Well, not a brand new venture entirely, but it was a new phase of business, yes, that's right.

(Testimony of Philip Elman.)

We had never purchased and sold California wines to any great extent before.

Q. You are brand new in the business as to wineries and wine generally? A. That's right.

Q. Well, it was brand new to the company, in fact, this California still wine business?

A. Yes.

Q. As to handling it in quantities and as a continuous line? [167] A. Yes.

Q. You never had any experience with that before, had you? A. No.

Q. From April 27, 1943 did the Park, Benziger Company ever through you or through anybody make any attempt or effort to go out in the market and bring in any substitute wines?

A. No; we felt it was impossible.

Q. Well, you did not do it, because you knew you couldn't get it; isn't that correct?

A. I think so.

Q. Would you speak up, please.

A. Yes. I am sorry.

Q. You couldn't get it because there was none in the market, isn't that correct? Would you speak up, please. A. That's right.

Q. By the way, some time after April 27, 1943 did you personally arrange in any way with a Mr. Baer or a Mr. Rathjen, or both, to buy one or more cases of this very Bercut wine?

A. Yes, with Mr. Rathjen.

Q. When did you arrange that?

(Testimony of Philip Elman.)

A. That was several days after the 27th; around May 5, I think. He wrote me a letter. The date is on the letter, incidentally, and he wrote to the hotel.

Q. The date is on the letter. Have you that letter here from Mr. Baer or Mr. Rathjen?

A. Mr. Rathjen.

Q. Will you produce it, please.

Mr. Bourquin: Yes, I would be glad to.

Mr. Naus: This is the first I ever heard of it.

Mr. Bourquin: Here you are (handing document to counsel).

Mr. Naus: Thank you.

Q. Is this the letter you referred to?

A. That is right.

Mr. Naus: I ask it be marked for identification.

Mr. Borquin: Do you want to put it in evidence?

[168]

Mr. Naus: I asked that it be marked for identification.

(The letter was marked Defendants' Exhibit B for Identification.)

Mr. Naus: Q. I notice that is dated May 5, 1943. Were you in Oakland or San Francisco on that date?

A. I was in San Francisco on that——

Q. Pardon me?

A. I don't recall. Was it over a week-end or was it during the week, sir?

(Testimony of Philip Elman.)

Q. May 5 was a Wednesday.

A. I was in San Francisco.

Q. You were still registered at the Chancellor Hotel then, weren't you? A. Yes.

Q. As a matter of fact, throughout the entire time you were here from the time of your arrival, April 16, 1943, you were at the Chancellor Hotel, weren't you? A. Yes.

Q. When you checked out of there you went back to New York? A. I went to Los Angeles.

The Court: Did you say the Chancellor Hotel?

The Witness: Chancellor. I went to Los Angeles from San Francisco.

Mr. Naus: Q. You left here to go to Los Angeles. Did you meet Mr. Baer while you were here on that occasion?

A. Yes; I saw Mr. Baer several times.

Q. Did you arrange on or after April 27 with Mr. Baer to get one or two cases of the Bercut wines on hand either through Mr. Rathjen or through some dealer?

A. Through Mr. Rathjen; that is right.

Q. This letter marked Defendants' B for Identification, is that the outgrowth of your request to Mr. Baer that he would see if he could get some dealer to get a case of wine, a case or two of the Bercut wines for you?

A. No. That was the [169] outgrowth of the conversation with Mr. Rathjen.

Q. Your conversation with him? A. Yes.

(Testimony of Philip Elman.)

Q. What date did you have that conversation?

A. That was either the 4th or 5th of May, before this letter was sent over to me at the hotel.

Q. Roughly, that was a week after April 27, 1943, wasn't it? A. About that, yes.

Q. So it was not until a week after April 27, 1943 that you put Rathjen in motion to see if he could get a quotation for you from the Bercuts; is that correct?

A. No. He had offered me these wines when I spoke to him, telling me of this lot of wine which was Bercut wine that had been offered to him by Mannberger about two or three weeks before, and he said it was 5,000 cases of wine. He had been down to see the wine; he described the identical wine that we purchased under contract. I said, "Harry, put it down in writing and send it over to the room in the hotel, and I will take it back to New York with me."

Q. Did you at some time arrange with him to get a case or two of it as samples?

A. Yes, I asked him to get me samples.

Q. You asked him to get you samples sometime around May 5, 1943?

A. Yes. After that time, yes, sometime around that time.

Q. You told him what the wine was, didn't you, without getting samples?

A. Well, I just wanted to ascertain whether it was the same lot of wine that was sold to us under

(Testimony of Philip Elman.)

that contract or not, whether we purchased other wine from Bercut.

Q. Take a look at the letter here. You can see the letter itself refers to Bercut Brothers wine, can't you?

A. Owned by Bercut Brothers. They owned other wine besides the wine which we had bought under our contract. This was [170] evidently with the Chianti——

Q. Now, you are arguing brands, Mr. Elman. They could sell you Chianti wine without owning it at the time at all. They could act as a sort of middleman. Have you ever done that sort of thing yourself?

Mr. Bourquin: May I have the question read?

(Question read.)

Mr. Bourquin: I think Mr. Naus is doing the arguing.

Mr. Naus: I was arguing back at the argument of the witness. I will put this question to you:

Q. As you sit there speaking of wine owned by Bercut Brothers, have you any knowledge of your own that on April 27, 1943 they owned any wine whatever except that mentioned in this contract and that you saw down at the warehouse? A. Yes.

Q. What other wine is it that you know they owned on April 27?

A. Vermouth and champagne from Fruit Industries and Chianti wine which we purchased from them.

(Testimony of Philip Elman.)

Q. Any other?

A. There was some brandy mentioned, I think.

Q. That is all you know, is it? A. Yes.

Mr. Naus: That is all from this witness at this time.

Redirect Examination

Mr. Bourquin: Q. The matter about which you just spoke, I would like to have that letter—I will offer the letter in evidence. It has been referred to.

The Court: Admitted.

(The letter was marked “Plaintiff’s Exhibit 10.”)

Mr. Bourquin: I would like to read it. It is on the stationery of “Harry F. Rathjen Co., Importers, Wholesale Wines and Liquors, 664 Mission Street, San Francisco.” It is addressed to “Mr. Phil Elman, Park Benziger & Co., New York, N. Y.” [171]

PLAINTIFF’S EXHIBIT 10

“May 5, 1943

Dear Phil:

We have recently been offered a lot of Dry Wines bottled by Fruit Industries. This lot consists of about 5000 cases of 12/5ths, in the following varieties: Burgundy, Zinfandel, Claret, Sauterne, Riesling and Chablis.

As you know this is in excess of what we could use for our normal business require-

(Testimony of Philip Elman.)

ments, and it occurred to me that you might be interested.

The price quoted us was \$6.50 per case, and if you are interested at all, we would be satisfied with a commission of 50¢ per case for handling.

This wine was quoted us by a salesman for Fruit Industries, and is owned by Bercut Bros., operators of large markets in our city, and was apparently purchased by them from Fruit Industries some time ago on speculation. It is not labeled or cased, except for the required small label stating type, producer, etc., so it would be necessary for you to supply a label approved by the FAA.

Since this merchandise was offered to us by Mr. Mamberger, of Fruit Industries over two weeks ago, you of course understand that I would have to find out if this lot is still available to me, so I can only offer it subject to my having it confirmed.

Please let me hear from you immediately on this matter.

Kindest regards,

HARRY F. RATHJEN."

Q. Mr. Elman, let me ask you this: When Mr. Hermann came out [172] to San Francisco in

(Testimony of Philip Elman.)

April, you testified this morning he came a few days ahead of you? A. He did.

Q. On that occasion. Will you tell us whether or not Park, Benziger asked Mr. Hermann to make that trip? A. Oh, yes, we did.

Q. They did? A. Yes.

Mr. Bourquin: I think that is all the questions of Mr. Elman at this time, your Honor.

Mr. Naus: No further questions.

SERGE HERMANN,

called for the Plaintiff; sworn.

The Clerk: Will you state your name to the Court.

A. Serge Hermann.

Direct Examination

Mr. Bourquin: Q. Mr. Hermann, you have been seated in the courtroom today, have you?

A. I have.

Q. Are you the Mr. Serge Hermann spoken of here in the testimony today? A. In the flesh.

Q. Your business is what, please?

A. I am a general wine broker.

Q. General wine broker. Your place of business is New York?

A. Is at No. 48 West 48th Street, New York.

Q. 48 West 48th Street, New York. Were you in the same business at the same place in January of 1943?

(Testimony of Serge Hermann.)

A. In January of 1943 I was the holder of a general wholesaler's wine license in New York in addition to my brokerage business all over the country.

Q. Well, I think Mr. Naus wants to ask you, so I will ask you, Are you a holder of a wholesaler's license at this time? [173] A. I am.

Q. You are. Mr. Herman, I will call your attention to the contract which is here as Plaintiff's Exhibit 2. You know what I am talking about, do you? A. I do.

Q. That was the contract that you and Bercut Brothers negotiated with one another in January 1943? A. That is correct.

Q. By whom was the contract prepared or written?

A. It was prepared by Mr. Evans, the general manager of the Merchants Ice & Cold Storage.

Q. The supplemental memorandum, a copy which extends the term of delivery on this contract, by whom was that prepared?

A. It was also prepared by Mr. Evans.

Q. Will you tell us whether or not in the course of your negotiations for that wine with the Bercut Brothers you told them where or with whom you expected to market the wine?

A. On the day of the signature, or the signing of the contract, I explained to them that it was my intention to appoint a distributor in New York and have them take over the sale of that wine, and that I had particularly in mind Park, Benziger & Com-

(Testimony of Serge Hermann.)

pany, subject of course to their accepting the proposition after I had explained it to them.

Q. Who did you tell that to?

A. To Mr. Evans and Mr. Peter Bercut and to Mr. Jean Bercut.

Q. That was on the date of the signing of the contract, Plaintiff's Exhibit No. 2?

A. Yes. It came up when Mr. Evans asked me what name he was to make out the contract.

Q. What was the conversation with respect to that?

A. The conversation was as follows: "I am not altogether sure as to whether Park, Benziger will take over the contract or not, because it is subject to their finding it to their liking." [174]

Q. Did they ask you in what name to make out the contract?

A. That is what Mr. Evans asked me, "In what name do you want it, to Park, Benziger, or do you want it to Chateau Montelena?" And I answered, "You might just as well make it Chateau Montelena, as I am going to submit it to Park, Benziger & Company, but send the samples to Park, Benziger & Company."

Q. Now, Mr. Hermann, you did at that time arrange for the shipping of samples to Park, Benziger; you did with them? A. Yes.

Q. Subsequently when you returned to New York you made your assignment and made arrangements for a consideration with Park, Benziger?

(Testimony of Serge Hermann.)

A. That is right.

Q. When you came out to San Francisco in April, when did you arrive?

A. I arrived here several days prior to Mr. Elman. I would place that sometime around April 10, I believe, April 9. My memory may be somewhat hazy. It was about a week or ten days prior to Mr. Elman's arrival. I was waiting for him, because my hands were tied.

Q. In the course of your arrival a week before he arrived, did you contact the Bercut Brothers?

A. Of course. I came here representing the Park, Benziger Company. I immediately got in touch with Mr. Jean Bercut or Mr. Peter Bercut. We had conferences which were all predicated upon waiting for Mr. Elman's arrival. I showed Mr. Bercut the label that we had finally agreed upon, and he told me that he liked the label very much, and I wired to New York telling them that the label was to Mr. Bercut's liking, and kept on writing, "Please do come here, do come here, because I can't do anything without you."

Q. After Mr. Elman's arrival were you present from day to day as the party discussed arrangements for casing and packing and shipping that wine?

A. I was present at every conversation [175] that Mr. Elman had with the Bercuts with the exception of one.

Q. Which one was that?

(Testimony of Serge Hermann.)

A. The one that took place on April 27 when they called in Mr. Elman, into their office, and I waited outside.

Mr. Naus: He probably means the 26th.

The Witness: The 26th.

Mr. Bourquin: Q. You say there was a day there, the 27th or the 26th, when Mr. Elman was called in and you were asked to wait outside?

A. That is correct.

Q. How long would you say the parties were in conversation before you joined them?

A. The parties must have been in conference for about a half hour.

Q. Were you after that invited in?

A. After that Mr. Jean Bercut came out of the office and said, "Will you step in."

Q. When you went in there, will you just tell us what ensued?

A. When I came in I found Mr. Peter Bercut, Mr. Jean Bercut, Mr. Evans, and Mr. Elman. Mr. Elman spoke to me and told me, he said, "Mr. Peter Bercut and Mr. Jean Bercut seem to have some kind of complaint with regard to some transaction that you have had. Are you willing to explain it to them? I asked them in fairness to yourself to give you a chance to be heard."

I asked Mr. Jean Bercut, "Well, what seems to be all the trouble?"

He started to reply, and spoke about the Chateau Montelena, the California firm that I was repre-

(Testimony of Serge Hermann.)

sending, and I asked him, "Well, if you want to have an explanation, I will be glad to bring Mr. Baer, or call on somebody right here in San Francisco who can substantiate what I am about to say."

Mr. Peter Bercut asked me, "If it would interest you, you can call your friends anyway, but tell me now: Here is a [176] contract. Where does it say you have the right to assign that contract?"

To which I replied, "Show me where it says in that contract that I have not got the right to assign it. At any rate, what seems to be all the trouble you have now? You are doing business with Park, Benziger & Company. Everything runs smoothly, everything seems to be very, very nice. What are you objecting to?"

He answered, "We are objecting to your being in the deal."

I said, "If that is the only thing that bothers you, we can certainly arrange matters in such a manner where I will be out of it. At any rate, you are doing business constantly with Park, Benziger & Company."

He said to me, "Well, we would like to have your personal release."

I said, "Personal release?"

"Your release."

"You mean," I said, "personal release?"

He said, "Yes, your personal release. We don't want to feel that in three months or four months or five months from now you can come back per-

(Testimony of Serge Hermann.)

sonally and ask for something and have you say that we have to negotiate with you."

I said, "That's all right. I will be glad to give you my personal release."

It was so arranged, and the very next day we were to meet for me to give it to him.

Q. That day when you left the office did you leave when Elman did?

A. Yes. We left in the finest of terms. Mr. Jean Bercut invited us to supper at his home. Mr. Elman said, "Can Serge come, too?" He said, "Sure." We went to Mr. Jean Bercut's home. We had supper there. Mr. Elman danced a little [177] bit with Mrs. Bercut. That ended the evening.

Q. Were you present the next day at the meeting of the parties?

A. The next morning I came right down to the Merchants Ice & Cold Storage with Mr. Elman, and when we came into the office Mr. Peter Bercut was there, Mr. Jean Bercut, Mr. Evans, Mr. Elman and myself, of course. As I stepped in, at the edge of the table there were some papers that were ready, and we sat down, and Mr. Jean Bercut said, "You sign them."

I said, "Let me read it."

I looked at it. I read some kind of a document which was simply a release between the Bercut people and Chateau Montelena, and told him, "If it is a personal release, it means that, and you have absolutely nothing to do with me."

(Testimony of Serge Hermann.)

Q. This document I have in my hand has not been introduced in this trial so far. I will show you here the document that Mr. Naus and I just conferred about, and ask you if that is the document that you were presented with for signature that day.

A. It is.

Q. And if you signed it.

A. It is. There were five of them.

Q. There were five?

A. Five of them, five pieces, and I kept on signing them, and prior to signing them I asked Mr. Elman what he thought of that. He said, "Well, it is a matter absolutely personal between you and Chateau Montelena. We have no dealings. It makes no difference to me what you do, if you sign or do not sign."

I answered, "For harmony's sake I will sign it. It makes no difference. All I am interested in is to see your dealings between Park, Benziger and yourselves run smoothly."

Q. Did you sign?

A. I signed the five of them.

Mr. Bourquin: We will offer that in evidence.

[178]

(The document was marked "Plaintiff's Exhibit 11.")

Mr. Bourquin: I would like to call attention to the terms of the instrument, if I may, please. It is entitled

(Testimony of Serge Hermann.)

PLAINTIFF'S EXHIBIT 11

"AGREEMENT"

"This Agreement entered into this 26th day of April, 1943 by and between Pierre Bercut and Jean Bercut doing business under the firm name and style of P & J Cellars in the City and County of San Francisco, State of California hereinafter referred to as party of the first part and Serge Hermann represented to be the duly authorized special representative of the Chateau Montelena of New York competent to act in its behalf party of the second part.

Witnesseth:

Whereas the parties herein referred to did on the 29th day of January 1943 execute a certain agreement containing certain terms and conditions and Whereas it is considered by mutual consent that it will be to the best interests of both parties that the said agreement be cancelled in its entirety.

Now Therefore for and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid receipt of which is hereby acknowledged it is mutually agreed that all of the provisions, covenants, terms and conditions that were specified, embodied or stipulated in said agreement are hereby declared null and void and without any force or effect, in the same manner and to all intent and purposes

(Testimony of Serge Hermann.)

the same as if said agreement had never been entered into or had ever been written, and each of said parties shall be deemed to be free and clear of any and all claims, demands or obligations asserted by the one [179] party against the other from the beginning of the world to the date hereof.

In Witness Whereof said parties have hereunto set their hands this 27th day of April 1943.

P & J CELLARS"

Q. Mr. Hermann, following the signing of that agreement, then did the parties, Mr. Elman and Mr. Bercut, or either of the Bercuts, hold any further conversations with respect to the wine at the time while you were present?

A. Immediately thereafter, immediately after my signing this piece of paper and me saying I would be glad to see that the atmosphere was clear, Mr. Peter Bercut excused himself and stated he was to leave for Sacramento, or some place, and he was followed by Mr. Jean Bercut. They were in the outer office for about fifteen minutes, and we were left in the office, Mr. Evans, Mr. Elman and myself. A short time thereafter, about fifteen minutes thereafter, Mr. Jean Bercut came in and sat down in front of Mr. Elman and told Mr. Elman, "Now, Mr. Elman, no more contract. We

(Testimony of Serge Hermann.)

are going to do business along different lines. We are going to give you three cars of wine at the contract price, cash."

Mr. Elman got very, very much excited and said, "What do you mean, three cars? What do you mean, three cars of wine at the contract price? We have 60,000 cases at the contract price."

To which Mr. Jean Bercut answered him, "Why, in a few months from now, you can't tell, the wine may be worth eight or nine or ten dollars."

He said, "I am not interested in the wine being worth eight or nine or ten dollars. We have a contract and expect you [180] to live up to it. Mr. Benziger sent me here to see that that contract was carried out."

Mr. Jean Bercut kept on saying, "You will get three cars," and they were both very much excited, and then Mr. Elman got up and was just about to step out and motioned to me to go with him.

As we were stepping out, Mr. Jean Bercut ran to him and said, "Why, Mr. Elman, don't get excited. There is nothing to get excited about. Peter is away now. We can straighten matters out. Everything will be all right. We don't want to have any trouble. Don't make any trouble. Everything will be all right. Let's go now to the market and look at some Chianti wine that we still have to ship for you. We are going to get the bottles that we need, and everything will be o.k."

Mr. Elman cooled down a little bit, and Mr. Jean Bercut stepped out and took us in the car and

(Testimony of Serge Hermann.)

brought me to the market, where he had a conversation with Mr. Elman with regard to making up an additional car of Chianti wine.

Q. Did you see the Bercuts in connection with this wine? A. Yes.

Q. Or did you see Mr. Elman or Mr. Bercut together on the transaction after that?

A. After that.

Q. Did you see them together on the transaction?

A. After this evening, Mr. Bourquin?

Q. Yes. A. No.

Mr. Bourquin: You may cross examine.

Cross Examination

Mr. Naus: Q. Mr. Hermann, you spoke of having a wholesaler's license at the present time.

A. I did.

Q. Where? In New York?

A. In New York. [181]

Q. When was it issued? A. This year.

Q. When?

A. Licenses expire in New York on February 28, and are issued on March 1, and it was issued on March 1 for the year 1944.

Q. March 1 of 1944? A. Correct.

Q. On January 29, 1943 did you have a wholesaler's license?

A. In your own name?

A. In the name of Chateau Montelena.

Q. Well, you say you had it as Chateau Montelena.

(Testimony of Serge Hermann.)

A. Chateau Montelena is Mrs. Louise Hermann, and I had a solicitor's permit which was my own to act on behalf of Chateau Montelena, so that on January 29 I had two licenses, one of which was the wholesaler's license for Chateau Montelena under Louise Hermann doing business as Chateau Montelena, and one as Serge Hermann, general manager of Chateau Montelena of New York.

Q. Mrs. Louise Hermann is your wife, isn't she?

A. Yes.

Q. This name Chateau Montelena of New York is simply a business name that you selected for your wife as an individual to use in the wine business, isn't it?

A. Yes. It is a trade name like P. & J. Cellars. It is no different from P. & J. Cellars. P. & J. Cellars is a trade name, and Chateau Montelena is a trade name.

Q. Well, the Bercuts didn't put it in their wives' names. It is that different. Well, in any event, the only wholesaler's license in existence on January 29, 1943, so far as Serge Hermann is concerned, was the wholesaler's license in the name of Chateau Montelena of New York, which was a business name of Serge Hermann's wife. Have I got that correct?

A. No, that is not correct. It was a wholesaler's license under the name of that firm, Chateau Montelena of New York, and there was a solicitor's

(Testimony of Serge Hermann.)

permit in the name of Serge Hermann representing [182] Chateau Montelena of New York.

Q. You say a firm. A firm indicates two or more persons. A. Then it is just a concern.

Q. When you speak of a firm, you speak of Chateau Montelena, do you mean anybody other than Mrs. Louise Hermann?

A. When I speak, that is just a name; I am speaking about the owner of Chateau Montelena.

Q. That was solely Mrs. Louise Hermann?

A. Yes.

Q. Now, as a matter of fact, she personally has never done any wine buying, has she?

A. No. She has a husband to do it for her. I was it.

Q. The answer is, "No," she personally has never done any wine dealing; is that correct?

A. Yes.

Q. In the doing of the business for Chateau Montelena, you, Serge Hermann, did the handling of the whole thing? A. Yes.

Q. She left it to you to handle as you pleased and do anything you pleased with it, didn't she?

A. Yes.

Q. Did your wife allow her wholesaler's license to lapse on the expiration of it on February 28, 1943?

A. She did, but she retained a basic permit, a Federal permit, which never expired. In other

(Testimony of Serge Hermann.)

words, from an interstate viewpoint a basic permit exists, and then existed in 1943 and exists today, 1944.

Q. If you will confine yourself to answering the question asked you we will get along.

A. I beg your pardon.

Q. I am not asking you about basic permits. I am asking you about wholesaler's licenses.

A. Would you mind repeating the question?

Q. Did or did not your wife let her wholesaler's license in New York lapse by expiration of time on February 28, 1943?

A. On March 1, yes.

[183]

Q. Did she ever thereafter take out any other or subsequent wholesaler's license?

A. No, not in 1943. Yes, she did. If you want me to answer it that way, I will answer, yes, she did.

Q. When?

A. In 1944.

Q. March 1, 1944?

A. Yes.

Q. All right. Then from March 1, 1943 until March 1, 1944, one entire year, she was entirely without a wholesaler's license?

A. That is correct.

Q. During that same year you personally were also entirely without a wholesaler's license; is that correct?

A. No, that is not correct. I never had a wholesaler's license. I explained to you that I was a representative of a wholesale firm, and as such would

(Testimony of Serge Hermann.)

have a solicitor's license myself. In other words, you can't be holding both.

Q. But you used the expression "wholesale firm." You mean nothing more except your wife doing business under a fictitious name?

A. There is nothing fictitious now, Mr. Naus. When I speak about the wholesaler's license, I speak about a license that is given by the State Liquor Authority.

Q. I think you took umbrage unnecessarily. I am speaking, referring simply to the language of the law. When a person does business under a name not his own, it is a fictitious name.

A. I apologize.

Q. There is no need. I thought you just misunderstood. Well, all I am trying to find out is whether when you use the expression "wholesale firm" in your answer, whether you mean anything under the sun except your wife doing business under a fictitious name.

A. Definitely. I mean the wholesale license given to Chateau Montelena and Louise Hermann doing business under that [184] name.

Q. She is doing business under "Chateau Montelena"; that is all you mean?

A. That is all I mean.

Q. You came out here originally in January of 1943, didn't you?

A. Yes, the early part of 1943.

(Testimony of Serge Hermann.)

Q. Leaving New York about January 5?

A. Yes, in the early part.

Q. You came out here on your own time and at your own expense, didn't you?

A. At my own expense, on my own time.

Q. The answer is "Yes," then?

A. That's right.

Q. It was your own idea, wasn't it?

A. It was my own idea.

Q. You came out here to see if you could promote or develop a lot of California wine, was that correct?

A. Not altogether.

Q. What did you come out for?

A. I had a line, a line of Chateau Montelena of California. I came here to straighten out my affairs with the Chateau Montelena of California. They had shipped me some merchandise which had not proved to be the right merchandise, and I came here to find out what I could do with the Chateau Montelena wine right here, and if that firm could not keep on supplying wine whether I could secure a new line.

Q. That Chateau Montelena of California, that is the business that this Mr. Feldheym is connected with?

A. Was connected.

Q. The same Mr. Feldheym that was mentioned in these conversations of April 26 and 27?

A. The same Mr. Feldheym.

Q. Well, you came out here primarily to settle a controversy with Feldheym?

A. Correct.

Q. Did you settle it?

(Testimony of Serge Hermann.)

A. They were in no position to settle it.

Q. The answer is that you did not settle it?

A. The answer is [185] I did not settle it.

Q. Did you come out here solely to settle that controversy, or did you come out for another purpose?

A. I came for the purpose of finding wine. I used to come to California several times a year. I have done that for the last several years. It was not my first trip to California.

Q. Well, it is the first trip to California in which you ever attempted to buy wine for your own account, isn't it?

A. Absolutely not, because I closed a contract with Chateau Montelena the year prior.

Q. I asked you if that transaction between your wife under the name of Chateau Montelena of New York, that transaction, the one with Feldheym, was the first transaction in which you or she had ever sought to buy wine on your own account.

A. That is correct. We used a wholesaler's license there, because we had that line.

Q. Up to that time you had been simply a middleman or broker? A. Correct.

Q. That Feldheym transaction with the Chateau Montelena of New York, that never involved more than a case or two at the most, did it?

A. It only involved one carload, because they could not carry it.

(Testimony of Serge Hermann.)

Q. Up until the time of this Bercut transaction neither you nor Mrs. Hermann, or both, had ever bought more than one carload of California wine on your own account, had you?

A. That is correct.

Q. You say you were looking for some California wines that you could buy while you were here in January 1943. How long did you look for some wine that could be bought? How long did it take you to find it?

A. I was extremely fortunate. I [186] happened to know practically every jobber and every winery in the country, and when I came over to San Francisco I found that the Palace Hotel was filled with every person interested in the wine industry. I came up to see my friend Mr. Baer with the idea he might let me know where I could get some wine, and just by sheer accident Mr. Baer happened to know the Bercuts and happened to know that the Bercuts had put some wine away a couple of years before, and mentioned to me that due to the fact they were French that I might go down and see them and find out if something could come of it.

I went down to see the market without any hope to find wine, but as a man interested in his business and following it up, I followed—I was going to try to do what I could.

Mr. Naus: We are getting farther away from the question.

(Testimony of Serge Hermann.)

The Witness: You asked me how long I was here, how I came to secure that line of business.

The Court: Read the question, and listen to the question.

(Question read.)

Mr. Naus: Q. How long did it take you to find the Bercut wine? A. Two weeks.

Q. During that two weeks' period were you looking generally for wine? A. I certainly was.

Q. During that two weeks' period did you find any other wines than the Bercut wine that might be available?

A. Absolutely impossible. I looked everywhere, talked to any number of people, and sent out many personal letters, and received replies, every one the same: "We can't give you any line; we are tied up; we have no wine."

Q. At any time since April 27, 1943 has any California still wine been available to offer you or to Park, Benziger & Company [187] on the market?

A. They were certainly not available to Mrs. Hermann or Mr. Hermann to Chateau Montelena, because we were not seeking it.

The Court: Just a moment. Read the question.

(Question read.)

The Court: Answer the question.

A. To Park, Benziger—I know about conditions in general. Definitely not.

Mr. Naus: Q. When you came out here in April of 1943 preceding by a week or ten days Mr. El-

(Testimony of Serge Hermann.)

man's arrival here, were you on your own time and your own expense on your trip?

A. I was at my own expense but not at my own time.

Q. Well, would you explain what you mean by that?

A. I would be glad to. When we entered into an arrangement for me to represent — when the Park, Benziger Company took over the contract that I had entered into between Chateau Montelena and the Bercut Brothers, they had arranged with me that I would devote my time to helping in the sales and promotional work of the sale of those wines. The transaction was that I would get fifty per cent commission and I would be at my own expense in doing this, which accounts somewhat for the fifty per cent commission on the net profits. So when I was traveling I was naturally interested in seeing the distribution of this wine was done as best I could, and my expenses were carried by myself. I would have been amply rewarded had the contract been carried through.

Q. Referring to Plaintiff's Exhibit 4, is that the arrangement you are speaking about?

A. Yes.

Q. Was there anything further in the arrangement between you other than what is in the writing there? A. Not that I know of. [188]

Q. None that you could recall at the moment. When you say that you weren't on your own time

(Testimony of Serge Hermann.)

on this trip out here in April, you mean, do you, simply that you considered that under Plaintiff's Exhibit 4 your time belonged to Park, Benziger?

A. I not only felt so, but I did it. I spent every minute of my time on behalf of Park, Benziger Company.

Q. In other words, you came out here in January in the first instance to see if you could find some wine and promote some kind of a wine deal with Park, Benziger; you made a contract with the Bercuts, you say, on that; you entered into a deal with Park, Benziger that you had to continue giving your whole time and at your own expense, and if it turned out profitable you would split the profits. Have I stated it fairly well?

A. You have stated it very well.

Q. Do you remember sending this telegram, Plaintiff's Exhibit 1, to Mr. Elman; do you?

A. I do.

Q. By the way, why did you address that to him instead of Park, Benziger & Company or to Mr. Benziger?

A. I addressed it to Mr. Philip Elman, care of Park, Benziger & Company, because I was very, very intimate with Mr. Philip Elman and I wanted him to hear the glad news first. I knew it was going to the firm, anyway. May I add, Mr. Naus, that I get lots of letters addressed to Mr. Serge Hermann, care of Chateau Montelena, and it is nothing unusual to address a certain party in a certain firm.

(Testimony of Serge Hermann.)

Q. Since you are the author of this matter, will you explain to us the meaning in your mind of the words in this telegram, "the finest bottle deal dreamed of."

A. It expressed exactly what I felt. I had never in my life seen as fine a lot of merchandise so nicely racked and put up, mountains of bottles, [189] as I had seen in the Bercut place, and in view of the circumstances that I knew existed in the market and the scarcity of wine, it was something unbelievable and, in fact, when I spoke to a number of people about it they hardly believed it; so when I wired I "definitely completed the finest bottle deal dreamed of," I meant to say my dream had come true, I had found a very, very fine lot of merchandise bottled along certain lines.

Q. Do you mean to suggest that you could not find a duplicate or a substitute lot of wine in the United States?

A. Better men than I have tried it.

Q. That is not the question.

The Court: Read the question.

(Question read.)

A. No, I could not.

The Court: The jury will please remember the admonition heretofore given. I will continue the trial until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until Thursday, March 16, 1944, at 10:00 a. m.) [190]

(Testimony of Serge Hermann.)

Thursday, March 16, 1943, 10:00 O'clock A. M.

The Court: The jurors are present; you may proceed.

SERGE HERMANN,

recalled;

Cross Examination

(resumed)

Mr. Naus: Q. Mr. Hermann, I show you Defendants' Exhibit A, which is a carbon counterpart of a telegram of February 8, 1943, from Mr. Elman to you; you received the original, did you not?

A. I did, Mr. Naus.

Q. Have you it? A. Beg your pardon?

Q. Do you still have it?

A. Have I got the telegram?

Q. Do you still have the original of the document that you have in your hand?

A. I most probably have it at home.

Q. Where? A. Home.

Q. You mean New York?

A. In New York, certainly.

Q. Is it in a file of papers, there?

A. It may be amongst my papers in my home.

Q. I mean, do you keep papers filed like a business man does, do you keep them in a separate file, all matters relating to certain subjects?

A. Not necessarily. I consider that more as a personal telegram than a business telegram.

Q. You notice the telegram speaks of him air-

(Testimony of Serge Hermann.)

mailing a letter to you. Did you receive such a letter from Mr. Elman? A. I believe I did.

Q. Do you believe you did receive it because you know that you received it, or are you just guessing?

A. No; I would not be quite sure. I am of the impression Mr. Elman phoned me, but I could not be quite sure whether a letter was received or not. It is possible. There is every likelihood that if he says he was airmailing me a letter that he did mail a letter. [193]

Q. Just to clear it up, I am really confused: Did you or not receive from Mr. Elman an airmail letter, pursuant to his statement in that telegram?

A. I say that I do not recall.

Q. Now, I notice your telegram to him is dated February 2nd; his telegram to you is dated February 8th, six days after. A. Yes.

Q. I believe that was sent to Los Angeles?

A. That is correct.

Q. But your telegram to him was sent from San Francisco?

A. That is correct, immediately after the completion of the deal.

Q. In the six days from February 2nd to February 8th had you heard from Mr. Elman, or Park, Benziger & Company, or Mr. Benziger, by either telephone, telegram, or letter?

A. I believe by telephone.

Q. Who telephoned you?

A. Mr. Elman.

Q. When?

(Testimony of Serge Hermann.)

A. Sometime between the 2nd and the 8th.

Q. That is the reason I asked the question, because there are six days in that interval.

A. I cannot recall exactly; it was the 3rd, or 4th, or 5th, it is between the 2nd and the 8th.

Q. Tying it to some event, how soon was it that you received the telephone call from Mr. Elman, how soon was it after your telegram to him on February 2nd?

A. I should imagine a couple of days thereafter.

Q. He called you here at San Francisco, did he?

A. At that time I was, the 2nd or 4th, I believe in San Francisco.

Q. Did he call you at some hotel, here?

A. He would have called me at wherever I stopped, either the Alexandria or the Chancellor.

Q. Well, he would have called you where you stopped if he knew that. Had you told him where you would be?

A. Certainly. He wired me, so he must have known where I was. He wired me at the [194] Alexandria.

Q. In Los Angeles? A. Los Angeles.

Q. At what hotel were you stopping in San Francisco on February 2nd?

A. I believe it was the Chancellor.

Q. Tell me the substance of the telephone call between you and him on this occasion.

A. "Phillip, I am happy to tell you I have closed

(Testimony of Serge Hermann.)

a very, very interesting deal with the Bercut people. They are fine people. I have bought from them about 60,000 cases of wines, of which about 27,000 cases are now bottled, racked and very, very fine condition. I have sampled the wines at the City of Paris with Mr. Verdier, found them to be very good, and made arrangements to bottle the balance of the stock for which they now have contracts with the Fruit Industries so that they will be able to complete 60,000 cases. Here is the deal that we have been looking for. We will have continuity, we will be able to get wines all the time under your own label and we should be able to develop a real nice business. I found the Bercut people very fine people. They want to cooperate with us and will give us every bit of assistance and every bit of cooperation possible." That was the substance of my call.

Q. Well, did he say anything to you?

A. Wait a minute. You just asked me——

Q. I asked you the substance of the conversation.

A. He answered, "I am very happy, Serge; I am just waiting for your contract. As soon as you come home we will be glad to discuss the entire thing." That is about all that he said.

Q. Did you or not in that telephone call offer to give him the contract when you got back to New York?

A. I testified that prior to my leaving New York I had already spoken—— [195]

(Testimony of Serge Hermann.)

Q. Mr. Herman, let's forget about the testimony you have given otherwise, and please answer the question.

A. What is the question?

The Court: Read it.

(Question read.)

A. I said subject to approval I would be very glad to submit it to them first.

Mr. Naus: Q. What did he say about that?

A. He said he would be very happy.

Q. Did you have any further telephone call or talk with him at any time after you left New York on January 5, 1943, until you returned there about February 15, 1943?

A. Between January 5, 1943 and what?

Q. Between January 5, when you left New York, and February 15th, when you got back there.

A. Not that I recall, outside of probably a couple of telegrams and a letter and a phone call.

Q. Well, the two telegrams, are they the ones that are marked as exhibits?

A. Yes. I recall another telegram that I sent in which I gave the details of the contract.

Q. A telegram sent by you to Elman?

A. To Park, Benziger & Company.

Q. About when?

A. Around the time when the contract was completed; it must have been around the early part of February.

Q. When you say the contract was completed,

(Testimony of Serge Hermann.)

do you mean the signing of a contract on January 29th? A. Certainly.

Q. Did you keep a carbon of that telegram for your own files?

A. There is every likelihood I did.

Q. That is the reason I asked the question, did you? A. Yes.

Q. Produce it, please.

A. I would have it in New York. I had no reason for bringing those things. [196]

Mr. Naus: May I ask that the original be produced?

Mr. Bourquin: What is it you wish?

Mr. Naus: The telegram he now states has been sent to Elman, or Park-Benziger about or around January 29, 1943, when the contract was signed with Bercut.

Mr. Bourquin: I think that is the telegram you have.

The Court: No. It is a telegram in which he said he explained the contract in some detail.

Mr. Bourquin: We will see if we have such a document, your Honor.

Mr. Naus: I asked him whether there was any other telegram than these exhibits, and he started to tell me about this other one that is not an exhibit here yet. That is the one I was asking for. He does not seem to have his carbon here, so I am trying to find out by reference to the original.

(Testimony of Serge Hermann.)

The Court: Didn't you go through your files in New York and search out for papers relating to this case? A. No, I didn't, your Honor.

Q. You haven't done that at any time?

A. I have done that at no time.

Q. You knew the trial was coming up, didn't you?

A. Yes, your Honor, but I presumed that plaintiff would have all those papers and I didn't see any reason why I should look up my papers and bring them over.

Mr. Naus: If I may ask a question or two while we are waiting for the production, if your Honor please.

Q. You have been down to the plaintiff's lawyers' office, haven't you?

A. To the plaintiff's lawyers' office?

Q. Yes.

A. No. I have been down to plaintiff's office.

Q. Have you been to any office, any law office in San Francisco, [197] in connection with the matter?

A. In San Francisco, yes.

Q. Yes.

A. To Mr. Breslauer, to Mr. Bourquin's office.

Q. Mr. Breslauer was the lawyer who first had charge of this case for the plaintiff, is he not?

A. That is correct.

Q. Knowing him to be a careful and good lawyer, I would expect him to be asking you people to show

(Testimony of Serge Hermann.)

the papers beginning with the deal. Did he ask you for any papers connected with it?

A. He didn't ask me.

Q. Did you ever turn over any to him?

A. Personally, no.

Q. Did you ever see anybody turn over any to him? A. No.

Mr. Naus: Have you found it, Mr. Bourquin?

Mr. Bourquin: We have no such telegram; I am sorry. [198]

Mr. Naus: Mr. Elman, Mr. Bourquin has just announced that after a search they do not find the original of the telegram. By the way, may I reopen the issue and ask Mr. Elman where he sits about that telegram?

The Court: Yes.

Mr. Naus: Mr. Elman, where is the original of that telegram?

Mr. Elman: I do not know, sir.

Mr. Naus: Have you any idea whatever?

Mr. Elman: I am sorry.

Mr. Naus: I say, have you any idea whatever where it is?

Mr. Elman: It might be in our office files.

Mr. Naus: In New York?

Mr. Elman: Yes.

Mr. Naus: You say it might be?

Mr. Elman: Yes.

Mr. Naus: But you don't even know that, do you?

Mr. Elman: No.

(Testimony of Serge Hermann.)

Mr. Naus: Q. Now, Mr. Hermann, tell us what was said in it.

A. "Have completed very fine deal with Bercut Brothers, AAA-1 people, for the purchase of a lot of 60,000 cases of wine. 30,000 cases at present ready. Will be glad to give details; phone. Serge Hermann." Something on those lines.

Q. By that laconic word "phone" you requested him to telephone you?

A. I beg your pardon?

Q. By that word "phone" in the telegram you asked him to telephone you about it?

A. That is correct.

Q. Did he do it?

A. I said later on he telephoned. Those telegrams, you see, followed each other in very short time. You are speaking to me about a few days. In a few days an awful lot [199] can be done.

Q. I understand you sent this telegram about January 29, 1943; is that correct?

A. I should imagine around the 29th or 30th. I can't tell you to the day now when it was done. I know the telegram was around that date, advising the Park, Benziger people that I had concluded a very advantageous contract, which was sent to them. I gave them, naturally, in the telegram very shortly the big lines of the contract.

Q. Mr. Hermann, we are getting away from the question again. I just asked you about the date.

(Testimony of Serge Hermann.)

A. The date is within these few days, as near as I can fix it.

Q. Would we be reasonably safe in saying it was January 29 or 30?

A. You would be just as reasonable in saying the 31st. I don't know. It is around those dates.

Q. Would I be reasonably safe if I said it was January 29, 30 or 31?

A. I imagine so, yes.

Q. Having telegraphed him in that way, and with that message, around those dates, why did you again telegraph him on February 2 as though he had never heard about it before?

A. Now, the first telegram—those two telegrams practically completed each other.

Q. What?

A. Were practically completing each other. I was so happy over the entire deal that I thought was so marvelous that I wired them twice.

Q. You mean you telegraphed them the facts the first time and the enthusiasm the second time?

A. In the first telegram I explained to them exactly what the details were, and then there was some little arrangements that had to be completed, such as that modifying sheet that we had there. When it was definitely closed I wired them. [200]

Q. Let's see. When you say "this modifying sheet," you mean, do you not——

Mr. Bourquin: Plaintiff's Exhibit 2.

(Testimony of Serge Hermann.)

Mr. Naus: I know which one it is. I am trying to find the document. Plaintiff's Exhibit 2, attached to the contract.

Q. You mean the letter dated February 3, 1943?

A. Yes.

Q. That is attached to Plaintiff's Exhibit 2?

A. That is correct. That is correct.

Q. In connection with any telephoning that Mr. Elman did to you after receiving your telegram of January 29, 30 or 31, if he telephoned you, did he suggest that a modification be obtained referring to vintage?

A. Of course not.

Q. Why do you say, "Of course not"?

A. Because I submitted to him the general lines. I didn't tell him anything about vintage or anything. The question of vintage was propounded by myself.

Q. I think perhaps you misunderstood. Of course, nothing about that was stated in the telegram, but if he phoned you immediately after getting the telegram of January 29, 30 or 31, and you explained it to him more at length, he may have suggested vintage to you. Did he?

A. No, he didn't, for the simple reason the contract was closed when I explained it to him, so there was no sense in him asking me to make any changes.

Q. Well, but you went down and asked for the change anyway, didn't you?

A. Certainly, for the safety of the contract itself.

(Testimony of Serge Hermann.)

Q. Notwithstanding the contract had been closed, you went down and asked for a modification of it on February 3?

A. Certainly. I had been carrying on the detail without Mr. Elman, Park, Benziger, or anybody else. [201]

Q. Up to that time it was entirely your own deal? A. Certainly.

Q. Have you now told us all the telegrams, telephone talks and letters that passed between you on the one side and Elman, Benziger or Park, Benziger & Company on the other, between January 5 and February 15, 1943?

A. As far as I recall, yes.

Q. Now, I understand in April when you and Elman separately came out to San Francisco, April 1943, you preceded Elman about a week or ten days?

A. That is correct.

Q. In that period of a week or ten days that you were here alone or on your own, did you have any communication with New York, either Elman, Benziger or Park, Benziger & Company by telephone, letter or telegram? A. I did.

Q. In what manner or what form?

A. Both telegram and telephone.

Q. Were there telegrams from each of you to the other, or only from you to them?

A. Between the two of us.

Q. Well, I ask the production of the carbon that

(Testimony of Serge Hermann.)

you made of your telegram and the original of the one that you received from them.

A. Mr. Naus, as far as my records are concerned, I have them all in New York. Your Honor asked me whether I had to go through the files to bring them with me, and I stated I didn't think I had to do that or it was necessary, and therefore I didn't bring those things, as far as I am concerned. So the question you ask me, from New York I have none.

Q. To have no misunderstanding about it, you are not producing them at this time because you are stating they are physically in the State of New York, is that right?

A. Yes, by all means. [202]

Mr. Naus (to counsel for plaintiff): I ask you folks for the counterpart of his file.

Mr. Bourquin: If we may peruse that, Mr. Naus.

The Witness: Do you wish this, Mr. Naus (handing document to Mr. Naus)?

Mr. Naus: Yes. Thank you.

Mr. Bourquin: I have one wire, Mr. Naus, in that period. I will see if we have anything further.

Mr. Naus: I ask that this be marked for identification at the moment.

The Court: Let it be marked.

(The document was marked "Defendants' Exhibit C for Identification.")

The Court: What is it?

Mr. Naus: I will offer it and save time.

(Testimony of Serge Hermann.)

The Court: I don't want to see it. I just wanted you to say what it is. Is it a copy of a telegram?

Mr. Naus: It is a telegram, Western Union, dated Chicago, Illinois, March 25, 1943, addressed to Philip Elman, care of Park, Benziger & Company, Inc., 24 State Street, New York:

DEFENDANTS' EXHIBIT C

“Leaving 8:45 tonight train 87 San Francisco Challenger Car 871 Lower Ten Regards.
SERGE.”

Q. You remember sending that, do you?

A. Yes, sir.

Q. Pardon me? A. By all means.

Q. That, then, was while you were en route from New York to San Francisco on the occasion in question, was it? A. Yes.

Q. You left Chicago on March 25?

A. That is the date, yes.

Q. You sent it——

A. I am looking at it, Mr. Naus, and it says March 25, so I sent that telegram it must have been [203] March 25.

Q. Did you come from Chicago direct to San Francisco, or around by way of Los Angeles?

A. Around the way to Los Angeles, I believe.

Q. How long were you in Los Angeles?

A. I must have been there a couple of days—three or four days.

(Testimony of Serge Hermann.)

Mr. Naus: Mr. Bourquin, that is a telegram obviously before his arrival here. I am asking about the telegrams he says he sent while here.

Mr. Bourquin: I am sorry, but Mrs. Herzig says she hasn't them there. While I do not want to argue this matter, I think it is only fair to say naturally these people coming out from New York brought such matter as their attorneys indicated to them would be of assistance in presenting their case, and did not undertake to bring out all the records of Park, Benziger & Company, and no demand was made that would enable them to do that, if I understand the question of dates and times. Mr. Naus did serve a rather complete blank demand to produce—was it March 4, George?

Mr. Naus: Around that date; I think it was the 4th.

Mr. Bourquin: I believe—Mr. Elman can tell us—that the parties had already packed, Mr. Elman of Park, Benziger had left New York under the arrangement made, and at least they had no communication from the defendants. If these matters are vital, and counsel thinks they are, as to warrant a delay of the trial of this case, we could wire to New York and see if further records can be sent out here. But the matters he is bringing out in this cross examination—I do not see where there is any dispute about them, how they affect the issues in this case. [204]

The Court: Mr. Bourquin has made a statement. Do you wish to reply?

(Testimony of Serge Hermann.)

Mr. Naus: Why, yes, I would like to make further comments. This is not the first, this is the second, trial of this case. It is suggested that they have only brought out what they thought their attorneys wanted. I think that is pure speculation on the part of Mr. Bourquin, because this very telegram, Defendants' Exhibit C—why under the name of the sun should they be asked to bring out a telegram giving particular details of the train on which he left Chicago and nothing more, and then bring none other?

Mr. Bourquin: That was attached to something.

The Court: Gentlemen, you have both made statements now. You may proceed with the trial.

Mr. Naus: Then, as I understand it, no telegram can be found such as the witness has described sending?

Mr. Bourquin: No. Did you ask for such at the last trial? That would have given him some notice.

Mr. Naus: I thought your Honor asked us to discontinue this colloquy. I am only asking them if they can produce the documents now.

Mr. Bourquin: George, I told you I cannot produce it now.

The Court: I think the situation is clear to the jury. You may proceed.

Mr. Naus: Q. I understood you to say on direct examination, Mr. Hermann, that on the trip in ques-

(Testimony of Serge Hermann.)

tion, "I came here representing Park, Benziger & Company." Do you remember that testimony?

A. That is correct.

Q. What do you mean by that—representing them, coming here to represent them?

A. Under the instructions of Park, Benziger [205] to prepare all the shipping for Mr. Elman, who only had authority to see that the final arrangements be carried out. I was here solely to do preparatory work.

Q. You recall, do you not, the paper of February 25 in here that speaks of a fifty per cent commission to you and the paper of February 25 attached to the contract by way of assignment?

A. I do.

Q. Aside from those two papers is there any paper in existence or was there ever any in existence between you and Park, Benziger & Company, or between Park, Benziger & Company and Chateau Montelena of New York with respect to your relations with Park, Benziger & Company?

A. None, except the solicitor's license, which made me a salesman for Park, Benziger.

Q. Speaking of the license, Mr. Hermann—just to clear this up for me—I notice in Plaintiff's Exhibit 2, the contract of January 29, 1943, in describing the parties it says: "Chateau Montelena of New York, License No. WW9, with offices" and so and so in New York. A. Correct.

Q. That license WW9 mentioned in the contract was what license?

(Testimony of Serge Hermann.)

A. The wholesale wine license.

Q. The wholesale wine license of the Chateau Montelena of New York——

A. I see it on the table, Mr. Naus.

Q. You mean the one in the other trial?

A. That is correct.

Q. The contract, then, in referring to WW9 refers to this paper I have in my hand?

A. Yes, sir.

Mr. Naus: I offer it.

The Court: Admitted.

(The document was marked “Defendants’ Exhibit D.”)

DEFENDANTS’ EXHIBIT D

NEW YORK STATE LIQUOR AUTHORITY

Wholesale Wine License

Permission is hereby granted under Chapter 478 of the Laws of 1934, as Amended, to the License hereinafter designated, to sell Wine at Wholesale in the premises herein designated.

Fee \$458.33

Certificate Number WW-9

(Name of Licensee and Address of
Licensed Premises)

Louise Hermann d/b/a Chateau Montelena of
New York

48 West 48th Street, (Room 705-A)

New York, N. Y.

County New York

(Testimony of Serge Hermann.)

(Name and Address of Owner of Building)

Albert M. Greenfield, Agent. 521 Fifth Ave.,
New York, N. Y.

48th St., Realization Corp.,

22 E. 40th Ct.,

New York, N. Y.

Dated May 4, 1942

This License expires on February 28, 1943

This License shall not be transferable to any other person or to any other premises or to any other part of the building containing such licensed premises.

This License shall not be deemed a property or vested right and may be revoked at any time pursuant to law.

HENRY E. BRUCKMAN

Chairman

(Seal)

EDWARD J. STRODEL

Countersigned

Before commencing or doing any business for the time for which this License has been issued, the said License shall be enclosed in a suitable wood or metal frame, having a clear glass space and a substantial wood or metal back so that the whole of said License may be seen therein, and shall be posted up and at all times displayed in a conspicuous place in the room where such business is carried on, so that all persons visiting such place may readily see the same.

It shall be unlawful for any person holding a

(Testimony of Serge Hermann.)

License to post such License or to permit such License to be posted upon premises other than the premises licensed or upon premises where traffic in any alcoholic beverage is being carried on by any person other than the Licensee, or knowingly to deface, destroy or alter any such License in any respect.

Ser. WW-594

Cert 3

Mr. Naus: Q. And that was the one that expired at the close——

A. At the close of February 28, like all licenses. [206]

Q. At the close of February 28, 1943?

A. 1943.

Q. At the time of finally entering into the deal between you on the one side and Park, Benziger & Company on the other, either orally on February 15 or in writing on February 25, 1943, or both orally and in writing, at that time did or did not Chateau Montelena of New York go out of the wine business?

A. They went out of the wine business at the end of February, the 28th.

Q. 1943? A. 1943.

Mr. Bourquin: May I interrupt a moment?

Mr. Naus: Certainly.

Mr. Bourquin: Would your Honor permit me to go to the telephone and let the trial proceed? Mrs.

(Testimony of Serge Hermann.)

Herzig can take care of the matter while we proceed.

The Court: Would you like a recess for five minutes?

Mr. Bourquin: I do not think it is necessary.

Mr. Naus: I am perfectly willing to recess.

Mr. Bourquin: I do not think it is necessary, your Honor.

The Court: Very well.

Mr. Naus: Q. Now, Mr. Hermann, in this Plaintiff's Exhibit 3 of February 15, 1943, which is a letter from Serge, yourself, to Pierre, meaning Bercut, in the next to the last paragraph you speak of placements in San Francisco.

A. That is right.

Q. Will you tell us what you mean by that and the purpose of it, and so on?

A. The conversation that I had with Mr. Bercut when I signed that contract was to the effect that we wanted to develop between the Bercuts and ourselves and the Park, Benziger people a continuous business. Mr. Bercut explained to me that he had entrees to the large hotels and to the large clubs here and he could effect placement of the merchandise in those large [207] hotels, in those large clubs, and send us those menus to New York, which would have been extremely helpful to the Park, Benziger for them in turn to put them in the large hotels and large clubs of New York, and this was indeed very fine cooperation.

(Testimony of Serge Hermann.)

Q. Then, as I understand it, the whole idea was that starting out to promote this wine, if it could be gotten into good hotels and clubs in San Francisco and gotten on the menu cards, and then copies of those menu cards sent to you in New York, you could go around and have a good sales talk; is that it?

A. By all means.

Q. That is all that was meant by it?

A. That is all that was meant by it. In other words, they were going to give us all the promotional help that was desired, because it was their purpose as well as the Park, Benziger's purpose to do business not only on this contract but after the contract.

Q. Was it your suggestion or Peter Bercut's that it be done?

A. The placement in the various hotels?

Q. Yes.

A. At my suggestion, and agreed to by Mr. Pierre Bercut.

Q. The objective of that was an attempt to make known something new on the market, something new that was being promoted?

A. Not necessarily something new in regard to the wine, but the Bercut Brothers wanted to have their name on the label on the bottles, especially selected by Bercut Freres, and under those conditions they were naturally very much interested in developing the sale of the Bercut Freres for years to come.

(Testimony of Serge Hermann.)

I explained a minute ago that the Bercut people were not interested—were interested not only in this particular contract, but it was their intention to have continuity, and [208] that is really what appealed to the Park, Benziger people. It was the development of a constant business—not one for six months or a year but one for three years, four years, ten years.

Q. Then, as I understand it, up to the date of the signing of the contract on January 29, 1943, there had been no wine put out under a label or a mark “Bercut Freres”?

A. As far as I know, not. They told me they were not in the wine business.

Q. So far as you know, they never were?

A. No, I never saw the “Bercut Freres” label.

Q. You told us yesterday, if I understood it, that you kept yourself informed and in contact with wine merchants, brokers and the like who were in that field, and when you first heard about this arrangement, that you went down to the butcher shop to find them, and that is the first time that you heard of them in the wine business?

A. That is correct.

Q. Up to that time no one had heard of them in the wine business?

A. No, sir.

Q. Up to that date they had never sold any wine, had they?

A. That is correct, so far as I know.

Q. Mr. Hermann, you were answering Mr. Bour-

(Testimony of Serge Hermann.)

quin about conferences on April 26 and April 27 down at the Merchants Ice office here. You spoke of signing a paper, and, as I understood it, you identified this paper, Plaintiff's Exhibit 11, as being the one signed. A. Yes, I signed five copies.

Q. You read that, didn't you, before you signed it? A. Very casually.

Q. Is the answer Yes, you read it? A. Yes.

Q. When you read it you understood every word in it, didn't you? A. Every word in it. [209]

Q. And when you signed it you knew that the word "release" is not in it, didn't you?

A. I didn't notice that. I am no attorney. I just knew that it was a separation between the Bercuts and myself personally, and I made it very clear to them before I signed it.

Q. When you hasten to explain you are not an attorney, do you mean to say that you never heard the word "release" until after you had seen an attorney?

A. I have heard the word "release," but I have not been that close to see whether the word "release" was in it or not.

Q. Take the word up here; you see up here the word "canceled," don't you? A. Yes.

Q. "Canceled in its entirety." You can see that, can you? A. I see that.

Q. You saw those words on April 27, didn't you? A. Yes.

Q. Whether or not you need an attorney to un-

(Testimony of Serge Hermann.)

derstand the word "release," every businessman knows the meaning of the word "canceled," doesn't he? A. He does.

Q. By the way before you signed it you observed Elman reading that paper also, didn't you?

A. No, sir.

Q. Did you say he did not read it?

A. I didn't say I observed Mr. Elman read it. I said I read it and then I showed it to Mr. Elman after I made it clear to the Bercut people that it was definitely a matter that concerned the Bercut people and the Chateau Montelena—solely a divorce of affiliations between the Bercut people and Chateau Montelena.

Q. Turning to another matter in that conversation of which something has been said in the testimony so far—I do not recall whether you, Mr. Elman, or both—about Jean Bercut offering only three cars of wine for cash after that cancellation [210] had been signed; you remember the reference to three cars, don't you?

A. The reference to three cars?

Q. Yes. A. Yes.

Q. Would you inform the jury, so I can pass on, as to what quantity makes up a carload?

A. The quantity makes up about 1,500 cases.

Q. 1,500 cases?

A. Under the present ruling where a car must be packed to visible capacity.

Q. In other words, under the ODT regulations

(Testimony of Serge Hermann.)

you have got to fill it as full as you can; that is correct, isn't it?

A. That is correct, to full capacity.

Q. At the time you signed the contract on January 29 you could still load a minimum car?

A. If you could get them.

Q. If you could get them?

A. As a matter of fact, Mr. Naus, the Park, Benziger Company had cars shipped by the Bercut people of Chianti, and they requested the Park, Benziger to increase the amount.

Q. So as to load it out full?

A. That is correct.

Q. Do you or not know the minimum quantity upon which the railroads would move wine at a carload rate?

A. If my recollection is right, I believe it is between 1,200 and 1,500 cases. It is dependent, Mr. Naus, upon the weight of the cases—on weight more than it is a question of cases.

Q. We can assume generally a carload would, say, be 1,500 cases? A. That is correct.

Q. And when you heard, as you say, Jean Bercut offering three carloads for cash on January 27, you would understand that to mean 4,500 cases, wouldn't you?

A. I was so dumbfounded I wasn't figuring the amount.

Q. Well, figure it now. Wasn't he offering you 4,500 cases [211] when he offered you three cars?

(Testimony of Serge Hermann.)

A. He was offering three cars.

Q. Speaking of regulations, there is an OPA ceiling mark-up on wine, isn't there?

A. As far as I know, yes.

Q. Well, you know about it, don't you?

A. Well, as far as I know, there is an OPA mark-up on wines.

Q. A wholesaler like Park, Benziger could not mark it up over 25 per cent of their cost, could they?

A. A wholesaler like Park, Benziger—and again, I am not an authority on OPA matters—would have the right to determine the price according to the price that existed for a wine equivalent to the wine they were buying in March 1942.

Q. And that was true only up to August 1943, wasn't it? A. I believe so.

Q. In August 1943 their mark-up was specifically limited to 25 per cent over cost?

A. In August 1943.

Q. In August 1943, yes.

A. If the price had already been determined prior to August 1943, if I understand it right, that was the price.

Q. Any price determined before that had to be first approved, did it not, by OPA?

A. You mean prior to August 1943?

Q. Prior to August 1943.

A. Mr. Naus, I am sorry, but I am no expert on OPA matters and I really don't know.

(Testimony of Serge Hermann.)

Q. I only have lingering in my recollection that at the other trial you brought in some bottles here that you bought at the Spreckels Market and other markets, and you brought along a little cash tag showing how much you paid for it, and then you took the witness chair and said you were familiar with OPA prices, and by a process of reasoning, with the mark-up backwards, you could figure what the Bercuts sold it for. Do you [212] remember that? A. I do not.

Mr. Bourquin: I object to that as improper cross examination.

The Court: Sustained.

Mr. Naus: Q. Up to and including January 29, 1943, in your negotiating conferences with the Bercuts did you at any time state to them or tell them that if at any time in the future they should break the contract you would be unable to get any other wine to replace it?

A. Conversation of that nature never took place between us. The contract was satisfactory; we were happy with it and took it up.

Q. Let us stay with the question: Up to and including the time that the contract was signed you never gave them any notice to that effect, did you? You never gave them any information to that effect?

A. Pardon me, Mr. Naus. Do you mean signed after I brought it to them, or signed between Bercut and myself? May I have the question a little clearer?

(Testimony of Serge Hermann.)

Q. I will reframe it. I will go a little further. The final paper that went to the final form of the contract was a paper signed on February 3, 1943, wasn't it?—that letter modifying it?

A. Between the Bercuts and Chateau Montelena?

Q. Yes. A. Yes.

Q. Up to and including the time that letter of February 3, 1943 was signed and delivered to you, had you ever informed the Bercuts if at any future time they broke the contract you would be unable to replace the wine?

A. We didn't even speak about it, no.

Q. The answer is you did not?

A. I did not.

Q. While you were in San Francisco on the occasion in January 1943, the occasion when the contract was signed, did you have any [213] talk at that time with the Bercuts about the labels that were to be put on the wine? A. Oh, yes.

Q. Tell us what you said would be done in that respect, how you would go about preparing the labels.

A. We said we would have to make up a special label; we would have to have it approved by the Federal authorities in Washington, and that furthermore, we had to have the name of the producer, and that is what accounted for—that is why we asked them to put in the original sheet, "Produced by California Wine Association," so that we in

(Testimony of Serge Hermann.)

turn would have to put that same notation on the label itself, because their wines were placed in such a condition here in San Francisco that it could only be sold intrastate, within the State, and to ship it interstate we had to have a Federal label approval.

Q. Did you tell them it would be a Park, Benziger & Company label?

A. Oh, definitely. I told them, I said at the time should Park, Benziger & Company take over the contract it would be a Park, Benziger label.

Mr. Naus: I think that is all at this time, your Honor.

Mr. Bourquin: That is all.

The Court: Anything further?

Mr. Bourquin: Not from Mr. Hermann, your Honor. I was going to call Mr. Breslauer for a matter.

ALFRED BRESLAUER,

called for the Plaintiff; sworn.

Direct Examination

Mr. Bourquin: Q. Your name is Alfred Breslauer?

A. Alfred Breslauer, 111 Sutter Street.

Q. Mr. Breslauer, you are an attorney at law of San Francisco? [214] A. I am.

Q. And have been for some several years last past, have you? A. I have.

(Testimony of Alfred Breslauer.)

Q. You are also one of the attorneys of record for the plaintiff in this action, are you?

A. I am.

Q. In other words, you are one of the plaintiff's attorneys representing them?

A. That is right.

Q. Had you represented Park, Benziger & Company prior to April 28, 1943?

A. No, I had not.

Q. I will ask you, calling your attention to the period of time when Park, Benziger's man consulted you with respect to this controversy, can you tell us when that was, what date it was?

A. That was April 28.

Q. Are you clear on the date? Had you any assistance in fixing the date?

A. The demand that I prepare, and which was served upon Mr. Jean Bercut, enabled me to fix that date.

Q. As the day before that instrument was drawn?

A. The day before was the first day that I had any conference with any representative of Park, Benziger, and the day on which certain telephone calls were made.

Q. So that you did on April 28, and the day before that instrument was drawn, you were consulted by Park, Benziger's representative, were you?

A. That is correct.

Q. Did you on that date communicate with any of the defendants?

A. I did.

(Testimony of Alfred Breslauer.)

Q. On April 29. And how?

A. By telephone.

Q. Did you speak to any of the defendants on April 28? A. I did.

Q. Which ones, please?

A. I spoke to Mr. Pierre—Mr. Peter Bercut.

[215]

Q. Peter Bercut? A. That is correct.

Q. Was the subject of your conversation one related to this controversy? A. It was.

Q. Just tell us what was said between you.

A. Prior to my telephone conversation with Mr. Peter Bercut I attempted to reach Mr. Jean Bercut.

Mr. Naus: If the Court please, he was only asked about a particular conversation, wasn't he?

The Court: Read the question.

(Question read.)

A. I told Mr. Peter Bercut that I had telephoned to Mr. Jean Bercut and had had no reply to my telephone message; that I was representing Park, Benziger & Company, and Mr. Elman of Park, Benziger & Company had consulted me, and that I wanted to obtain the return of the contract which Mr. Elman of Park, Benziger & Company had loaned to Mr. Jean Bercut, and asked Mr. Peter Bercut if he could return it to me or to Mr. Elman. I told him that if he did not wish to talk to me, I would be glad to talk to his attorney; if he would prefer, I would talk directly to his attorney. He said he couldn't give me the name of his attorney, as he didn't know who his attorney

(Testimony of Alfred Breslauer.)

would be; that he had a number of attorneys; that he did not have the contract, and that I would have to talk to Mr. Jean Bercut about the contract. I asked him if he would have Mr. Jean Bercut call me. He said he would.

Mr. Bourquin: Q. Prior to that had you made any attempt to communicate with Mr. Jean Bercut?

A. I had.

Q. What attempt?

A. I called the Grant Market and asked for Mr. Jean Bercut and left my name with the telephone operator to have him call me when he came in. [216]

Q. Subsequent to April 28 did you receive any return or reply from Mr. Jean Bercut or anything else from Mr. Pierre Bercut? A. I did not.

Q. Did you call again to the market by phone prior to your preparation of the demand, which is here in evidence as Plaintiff's Exhibit 9?

A. I called again on the 29th, prior to the preparation of the demand. I spoke to the telephone operator and asked if Mr. Jean Bercut was there. She said no, and asked me who was calling. I gave her my name. She said, "I recognize your name. You called yesterday. I gave that message to Mr. Jean Bercut. I will give him the message again."

Q. Did you hear anything back from him prior to your preparation and dispatch of your demand?

A. I did not.

Q. Was the demand, this Plaintiff's Exhibit 9, served on Mr. Jean Bercut that day?

(Testimony of Alfred Breslauer.)

A. It was prepared on the 29th, and I have my files—I think I delivered it to you—which is the affidavit of a process server that it was served that day. That is my recollection now. I will have to refer to that file.

Mr. Bourquin: You will agree to that?

Mr. Naus: It was agreed to yesterday, Mr. Bourquin; you and I agreed that the demand was made in the form there and that it was made on that particular day, whereupon you stated to the jury the substance of it.

Mr. Bourquin: I wanted to cover this point raised at that time as to what action was taken on the 28th following the statement that Mr. Jean Bercut made to Mr. Elman over the telephone.

Mr. Naus: Yes.

Mr. Bourquin: Q. Mr. Breslauer, following the service of the demand did you receive any reply or communication from Mr. Bercut, from either one of the defendants or anyone on their [217] behalf?

A. None whatsoever.

Q. Did you make any further attempt to communicate with them?

A. I have no recollection of any further attempt to communicate with them after the demand.

Q. How long did you wait before you filed a complaint in this case?

A. I think the complaint was filed within a period of a week or ten days—that is my recollection. Some time was spent in preparing the com-

(Testimony of Alfred Breslauer.)

plaint and getting together the authorities and different things.

Mr. Bourquin: That is all. You may cross examine.

Cross Examination

Mr. Naus: Q. Mr. Breslauer, in other words, up to the time the complaint was filed you had not heard from the defendants; that is correct?

A. That is correct.

Q. And since the complaint was filed that is about equally true, isn't it? You have not heard from the defendants since?

A. Oh, yes, I have heard from them since.

Q. With respect to the demands you made?

A. I heard from their attorney with respect to the demand, yes.

Q. Just one more question: Up to the time you prepared this demand, and without telling me—I am not asking what anyone said to you—who all did you talk to about this case?

A. I spoke to Mr. Elman and I spoke to Mr. Hermann—I believe that is all.

Q. In or around that time did you speak to a Mr. Baer about it?

A. Mr. Baer referred Mr. Hermann and Mr. Elman to my office. Mr. Baer is a client of mine.

Q. Mr. Ernest Baer?

A. Mr. Ernest Baer, and I am not clear whether he came with Mr. Hermann and Mr. Elman to my

(Testimony of Alfred Breslauer.)

office, or whether he telephoned to me and said they were coming over. [218]

Q. Aside from Hermann, Elman and perhaps Baer, you talked to no one else about it?

A. That is correct.

Mr. Naus: That is all.

Mr. Bourquin: That is all, Mr. Breslauer. Thank you. [219]

Mr. Bourquin: Mr. Naus asked yesterday for some communication from Park-Benziger, or further communication to the Bercut brothers on the subject of the assignment, and I now want to call your attention to this letter of March 11, which was among the records of the Clerk.

Mr. Naus: You may offer it, or I will offer it, or I will join you in an offer of it, but there is not a word in there about an assignment.

Mr. Bourquin: I will let the letter speak for itself, and I will offer it, your Honor, as plaintiff's exhibit next in order. May I read it?

The Court: Yes.

(The letter was marked "Plaintiff's Exhibit 12.")

Mr. Bourquin: It is on the stationery of Park, Benziger & Co., Inc., with their address and other letterhead information at the top, and dated March 11, 1943, New York. Addressed to:

PLAINTIFF'S EXHIBIT 12

“Merchants Ice & Cold Storage Co.,
Lombard & Montgomery Sts.
San Francisco, Calif.

Attention: Mr. Pierre Bercut

Gentlemen:

Just a few words to let you know of the progress we have made here on the labels for your wines.

To date we have had at least ten different artists drawing of various labels from which we have selected one, sample of which will go forward to you when finished, which we believe reflects the quality of the product which we will market. We have attempted in every respect to carry out the fine reserved atmosphere of our former imported merchandise in this new label. We have attempted to make a very simple yet highly dignified label with little colorings so as [220] to have a rich consumer eye appeal of the better imported wines.

We have also attempted to Americanize the label to a point where it is readily interpreted by the consumer from its point on the shelf. There are, of course, many other details which we have exhausted before finally selecting this label, which are too numerous to mention. We feel that you will be very happy with our selection.

We fully realize that you may be very eager and anxious to start casing merchandise for

shipment. We must however not lose sight of the fact that in the preparation of the labelling and packaging it is necessary to take adequate pains and time so that the ultimate product will reflect all its justifiable merits.

We further realize that it is your desire and ours to build a business on these wines to outlast present war time conditions—therefore we are proceeding with the utmost care basing our operations here on a far sighted policy. I am sure that you are cognizant of this and are willing to have the necessary time spent for producing, labelling and finishing the package.

At this writing it will be about two weeks before we can make our trip to the Coast. By that time we will have with us finished labels and we will then be able to give you shipping instructions which will start the wine moving to our various accounts.

Anticipating the pleasure of meeting you and your brother Jean personally, and with kindest personal regards from Mr. Serge Hermann, I remain,

Very truly yours, [221]

PARK, BENZIGER & CO., INC.
PHILIP ELMAN,
Vice-President."

PIERRE J. CHOLET,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you give your name to the court and jury, please? A. Pierre J. Cholet.

Direct Examination

Mr. Bourquin: Q. Mr. Cholet, you live in San Francisco? A. Yes, I do.

Q. What is your business, please?

A. Wine merchant.

Q. Wine merchant. May I ask how long you have been in the wine business?

A. Ever since 1933 in this country, and previous to that in Europe.

Q. Prior to 1933 in Europe. Where is your place of business in San Francisco?

A. 580 Market street.

Q. 580 Market Street. How long have you been in business in California?

A. Since October, 1942.

Q. Where prior to that time had you done your business in the United States?

A. I was in the East. I had a consulting business in New York up to 1939. Then I became associated with California Wine Sales, of Lodi, California, as Gulf Coast Manager, stationed in New Orleans, and covered all the territory of Texas, Louisiana and Florida.

Q. That was what period, please?

A. That was from 1939 to January, 1942; September, 1939 to January, 1942.

(Testimony of Pierre J. Cholet.)

Q. Prior to your entry in business in the United States, you said you had been in business in Europe, in the wine business.

A. Yes; my family was in the wine business.

[222]

Q. What part of Europe, please?

A. In Tours, France.

Q. So you were born and raised in the wine business?

A. Yes.

Q. At the present time what is the nature of your wine business?

A. Well, producing wine and buying wine, and shipping wine in bulk.

Q. Are you familiar with the wine industry and the circumstances of it in California?

A. Yes, I am.

Q. Were you familiar with it prior to January of 1943?

A. Yes, I was.

Q. Will you please tell us, Mr. Cholet, what was the circumstance of the wine industry, what was the situation in it in 1942 and at the opening of 1943, with particular reference to wines of the types we have spoken of here, still wine?

A. Well, the demand for wine started to become very active in the spring of 1942, and the prices naturally started to climb, as the demand became greater, and several large whisky outfits came into the State of California and started buying wineries and accumulating inventories sometimes in the fall of 1942, I believe it was, and created a great

(Testimony of Pierre J. Cholet.)

shortage, with the result that the majority of the bottlers of the country were without a source of supply, and started coming to California to look for new sources of supply. I was one of them. As a matter of fact, I came here in October because my partner was ill, and there was no sense of being out selling when we had no merchandise for sale. We were brokers at that time, and we were forced into the producing business because we had to get wine.

Q. So you came to California in the latter part of 1942 to meet that situation? A. Yes.

Q. What was the influence and the progress of the situation from October, 1942 up, on through the early months of 1943?

A. It became much worse, because all these bottlers were here and [223] were knocking at the doors of the wineries, and the producers, every day, and getting everyone crazy, and naturally when the next one came the price had gone up a little bit and no sales had been made. That went on until the time that OPA stepped in to attempt to put a stop to the craze of price raising.

Q. Are you familiar with the wines, or the type of wines that were the subject of the contract that is marked Plaintiff's Exhibit No. 2, Mr. Cholet? I will refer you to page 2 of that document. You might look at the specification of wine on that and answer the question, please.

A. Yes, I am, Mr. Bourquin.

(Testimony of Pierre J. Cholet.)

Q. By the way, had you ever chanced to see this particular wine, yourself? A. Yes.

Q. Where?

A. I saw it first at the Merchants Ice & Storage Company, where Mr. Jean Bercut and Mr. Hermann took me, together with Mr. Pierre Bercut, and I saw the racked wine, at the popular temperature, and kept in wonderful shape, and told Hermann that he had, I believed he had made a very unusual deal.

Q. When was that, do you remember?

A. That was in—that was a few days after he had closed the deal with them. I don't recall the exact date. It was probably in February of 1943.

Q. Let me ask you, at that time and on from that period was there any market in California and San Francisco for wine of that type?

A. There was a very active market, and there still is. As a matter of fact, it is still rather difficult, it is difficult for us, especially as wine merchants to find even ordinary wine. We have stopped looking for that class of merchandise long ago.

Mr. Naus: Mr. Bourquin, I don't like to interrupt, but I didn't understand whether your question refers—you mean a market in which any wine could be bought, or which it could be sold? I don't quite understand. [224]

Mr. Bourquin: Well, I want to know if there is any market—well, I will ask the question if there is any market.

(Testimony of Pierre J. Cholet.)

A. There are many people, such as ourselves, who would like to buy it, and there are many consumers who would buy a bottle directly from the liquor store.

Q. Do you know, and did you know during the period 1943 commencing with the months of March and April and running through the year, whether wines of similar type were being bottled and sold in San Francisco and California? A. Oh, yes.

Q. Do you know whether concerns were handling similar wines? A. Yes.

Q. Will you tell us whether or not owing to the influence and demand created, as you have described, since the latter part of 1942, that there has since that time and continues up to now to be a most active market for that type of wine in California that we have ever experienced?

A. Yes, it has.

Q. Do you know, Mr. Cholet, what the price reaction was to those conditions in that type of wine in the months of January, February, March, April and May, 1943? A. They went up in price.

Mr. Naus: May I have the answer stricken? If your Honor please, I object to any question going to the matter of price if it is designed to elicit any information as to prices at which the defendants could sell the wine in litigation as distinguished from the prices at which the plaintiff, Park, Benziger & Company, could buy the wine in the market. I object, secondly, on the ground that there is no

(Testimony of Pierre J. Cholet.)

evidence in the record to go into the question of market or market value, at all in the face of the admission by the witnesses Elman and Hermann that there was not available to them in the market anywhere in the United States any duplicate or substitute wines. [225]

Mr. Bourquin: I would like to make two observations as to that. It might be well for me to say at this time that I do not intend by that question, I don't want the witness to understand me to say that he has the prices of these wines, or similar types of wines for that period; I only want to know from him whether or not there was a sharp up-turn in the price of wines of this type in California and San Francisco throughout between January and April of 1943.

The Court: I think the testimony already indicates that, does it not?

Mr. Bourquin: Well, if so, I only wanted to emphasize it.

Mr. Naus: I add the further ground for the objection that it is now confessed to be repetitious in form.

The Court: I think so.

Mr. Bourquin: Well, if we are all agreed that that is in the record I am satisfied, your Honor.

The Court: Well, I don't know whether Mr. Naus will agree to that, but my recollection of the testimony of this witness was that the price of wine was rising and is still rising. Isn't that right?

(Testimony of Pierre J. Cholet.)

The Witness: A. That's right.

Mr. Bourquin: And sharply; let us say substantially. A. Very substantially.

Mr. Bourquin: You will agree to that, Mr. Naus?

Mr. Naus: Do you wish me to be sworn? I can tell you an awful lot about it. I am willing to be sworn.

The Court: Isn't it a matter of common knowledge?

Mr. Bourquin: Your Honor, I drink very little wine, even for a Frenchman, or of French descent; I drink very little wine. I will almost confess to not drinking any. [226]

Mr. Naus: I will join in that stipulation.

The Court: All right.

Mr. Bourquin: Q. Mr. Cholet, what other wineries or concerns in California, at the time we are speaking of, commencing with 1942 and throughout the years since, have and are producing the same type of wine?

Mr. Naus: One moment. I don't know what dates you are referring to in that question.

Mr. Bourquin: January, let us say commencing with January, 1943 and run right on to date.

Mr. Naus: If the Court please, that is objected to upon the same grounds heretofore stated with reference to the other question; upon the ground that it can only relate to the question of market or market value and there must first be a foundation laid that any wine produced was available to the

(Testimony of Pierre J. Cholet.)

plaintiff or to Hermann, or to Chateau Montelena of New York. There has been no showing of that kind.

The Court: Objection sustained.

Mr. Bourquin: That may be a question we will argue, your Honor. May I have an exception to that ruling to preserve our position?

The Court: Certainly. The evidence here shows it was Fruit Industries wine.

Mr. Bourquin: Yes, your Honor. I want to show it was a common type of ordinary type of California wine.

The Court: Well, I presume it will be admitted it was a common type of wine, will it not?

Mr. Naus: I will admit that it was any kind of wine, either Fruit Industries, or better or worse, whatever he wishes to describe it. [227]

The Court: It is ordinary wine, isn't it?

Mr. Bourquin: Yes. I want to show whether during the period we are speaking of other common, or similar types of wine are now being produced and being sold.

Mr. Naus: But that would still leave the record short of any showing that the plaintiff or Hermann had a market available to them.

Mr. Bourquin: I would like to argue the point. I know Mr. Naus has suggested a point of law in certain instructions he submitted, and interprets our code, the section from the Sales Act. I looked into the law some last night, and I would like to

(Testimony of Pierre J. Cholet.)

argue to your Honor. I know you do not want it now before the jury.

The Court: Yes. The ruling may stand.

Mr. Bourquin: May my statement, your Honor, be considered as an offer of proof that I made?

The Court: Yes. An offer of proof of what?

Mr. Bourquin: An offer of proof, your Honor, that all types of wine, the wines like these——

The Court: Could be bought in this market. Is that it?

Mr. Bourquin: Were being produced and sold in this market in San Francisco throughout 1943 and to date, and in quantity.

The Court: Well, I think perhaps Mr. Naus would be willing to stipulate that similar wines were being produced.

Mr. Naus: Yes.

The Court: What he objects to is any sales, any proof of any sale of the wine, because, first, a proper foundation has not been laid, and, second, as I understand it, because he doesn't think it is proper proof to offer at this time under the pleadings and so forth of the case. You say we don't need to discuss those things at this time. [228]

Mr. Bourquin: Yes, your Honor.

The Court: I think his objection is good. I understand now there is no objection on the part of Mr. Naus to your statement that there is similar wine produced in California to the wine involved in this case.

(Testimony of Pierre J. Cholet.)

Mr. Bourquin: Yes, your Honor.

The Court: That is true.

Mr. Bourquin: I want to go further.

The Court: You wish to go further and show what they were selling for?

Mr. Bourquin: Not what they were sold for by this witness, your Honor. I want to show they would be sold as fast as they could be produced, and that extends to their production throughout 1943 and right up to date, including today.

The Court: I suppose there is not any question, Mr. Naus, but what there is a great demand for California wines, as fast as they can be produced and put on the market they are sold?

Mr. Naus: If the Court please, no question that the wines are still growing, the sun is still shining on the grapes, the yare still getting the juice out of the grapes, they are still fermenting it, they are still selling the product.

The Court: And there is still a demand for the wines and wines are being sold.

Mr. Naus: Yes, but in admitting that I don't admit that either the plaintiff or Hermann or Mrs. Hermann, newcomers in the market, could come into the market and get any wine such as has been produced in California and bottled.

Mr. Bourquin: I may say, your Honor, I can understand and sympathize with Mr. Naus' position when I look at the whisky situation. I know how hard that is to obtain and they sell it [229] as fast as it can be obtained.

(Testimony of Pierre J. Cholet.)

Mr. Naus: I will stipulate with you further that they are still selling things they call whisky.

The Court: Now, gentlemen, do you want to leave the matter like this?

Mr. Bourquin: Well, I have made the offer of proof, your Honor.

The Court: Very well.

Mr. Bourquin: We have an exception to the ruling, your Honor?

The Court: Yes.

Mr. Bourquin: You may cross examine.

Mr. Naus: No questions.

HARRY F. RATHJEN,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Wil you state your name to the Court and jury? A. Harry F. Rathjen.

Direct Examination

Mr. Bourquin: Q. Mr. Rathjen, you live in San Francisco and are in business here, are you?

A. Yes.

Q. What is your business, please?

A. Wholesale wines and liquors.

Q. Your place of business is where?

A. Mission street, 664 Mission.

Q. How long have you been in the business of wholesale wines and liquors in San Francisco?

A. Since repeal in 1934.

(Testimony of Harry F. Rathjen.)

Q. Yesterday here in the course of discussion of this controversy reference was made to a letter of yours that you gave to Mr. Philip Elman, of Park, Benziger & Co. That letter is in evidence. I call your attention to it. Would you peruse it, please?

A. I recognize the letter. [230]

Q. You recognize the letter. The subject matter, Mr. Rathjen, would indicate that prior to the date of that letter you had been shown and had seen the wine in the Merchants Ice & Cold Storage Company of Bercut Bros., who are referred to in this letter, Plaintiff's Exhibit 10?

A. Yes.

Q. Under what circumstances, please, had you been shown or seen the wine?

A. Well, Mr. Bercut called for me at our place of business and took me down there to show it to me.

Q. For what object?

A. Well, we had shown an interest in purchasing some, and he merely took me down to show me the way it was racked, as a point of interest.

Q. And offered it to you for sale?

A. He said as long as there was some available we would be able to get it.

Q. Did he quote you prices on the wine he showed you?

Mr. Naus: I ask that the answer go out for the purpose of the objection. If the question is designed to elicit any offer to sell after April 27, 1943, I object to it on all the grounds heretofore stated in the questions put to Mr. Cholet.

(Testimony of Harry F. Rathjen.)

Mr. Bourquin: No. I want to show, if I can——

Mr. Naus: If, on the other hand, the question is designed to elicit an offer before April 27th, it would be relevant on another point and I would make no objection. It is not clear what the question really calls for.

Mr. Bourquin: I will withdraw the question.

Q. Let's ask this, how nearly can you fix the date when the wines were shown to you and offered to you? A. Oh, the letter is dated May.

Q. May 5th.

A. I would say it was in April.

Q. The letter says, "Over two weeks ago." Would that be about correct?

A. Approximately. [231]

Mr. Naus: That would make it about April 21st.

Mr. Bourquin: April 20th, I get.

Mr. Naus: April 21st, wouldn't it be, if I did not calculate incorrectly.

Mr. Bourquin: Q. The wine offered to you at that time, as the letter would indicate, was 5000 cases of varieties of burgundy, zinfandel, claret, sauterne, Riesling and Chablis. A. Yes.

Mr. Bourquin: That is all.

Cross Examination

Mr. Naus: Q. Have you the letter there? The date of the letter and your statement here with respect to two weeks, you subtract two weeks, would you, from May 5th, to get that date?

A. Yes, that is approximately it. I did not specify any particular date.

(Testimony of Harry F. Rathjen.)

Q. Yes. That is all I am trying to say. Am I correct in suggesting April 21st, I have calculated back just as anybody in the court-room could calculate it, so it would be April 21, 1943?

A. Two weeks.

Q. That is before that. As of that time when had you met Mr. Elman?

A. He happened to visit me shortly after I had seen these wines, I don't recall just when, and I spoke to him about these wines being available.

Q. About what date would you fix it that you spoke to him about them?

A. It just happened to coincide very closely to the date that I visited Merchants Ice there and saw the wines, a few days.

Q. Would you say, as best you can recollect, then, that it was about April 21st, 1943, you so told Elman?

A. It was coincident that Mr. Elman happened to come in a few days after I had seen the wines.

[232]

Q. I know that. You have previously told us that. My question is simply this, I am trying to fix the date as to when you told Elman the Bercuts' wine had been offered you, and, as I understand it, it coincides, or was about April 21st that you so told him. Have I got it right?

A. That is approximately right.

Q. You told him what wines they were, didn't you, the Bercut Bros.' wines down in the Merchants Ice & Cold Storage Company?

A. Yes.

(Testimony of Harry F. Rathjen.)

Q. Was anyone else present at that time?

A. No.

Q. Well, did he say whether or not he already claimed to have already bought that very wine from the Bercuts? A. No.

Q. What did he say to you about it?

A. He just said he was very much interested.

Q. Did he ask you to do anything about it?

A. Asked me to submit the offer in writing, and I said I would be glad to, as I already explained; I had made an offer to him verbally and he asked me to put it in writing.

Q. To get it clear, about April 21, 1943, you bumped into Elman.

A. We do business with Park-Benziger.

Q. Well, after April 21, 1943, you saw and talked with Elman? A. Yes.

Q. On that date you made an offering of wine to him, it was verbal, and your offering was 5000 cases of wine that was in bottles?

A. No specific figures were mentioned. I just told him that there was a large amount of wine available.

Q. And you identified it as the Bercut Bros. wine? A. Yes.

Q. The wine that they had down at the Merchants Ice & Cold Storage Company warehouse in bottles but not cased? A. Right.

Q. And laying on their sides in the racks?

A. Yes.

(Testimony of Harry F. Rathjen.)

Q. And that the Bercuts had had that for some time? A. Yes.

Q. And that, as a matter of fact, anyone in the wine business knew [233] was all the wine that the Bercuts then had? A. Yes.

Mr. Naus: That is all.

Redirect Examination

Mr. Bourquin: Q. Mr. Rathjen, let's clear this point up. Your letter indicates that over two weeks before May 5th the wine had been offered to you, the Bercut wine, by Bercut Bros., is that correct?

A. Yes.

Q. When was it that you drew Mr. Elman's attention to that fact that he ascertained from you, was it at that time, or was it on the eve of the letter which he asked you to prepare and give him?

A. Well, it was probably a few days after I had visited the wine cellars, that would make it around the 23rd or so. If it was the 21st that I visited it it would be a few days later.

Q. You testified on the occasion of the trial of this action before, didn't you?

A. Yes, I was up here once before.

Q. You testified on the same subject at that time, you recall, don't you?

A. I don't recall whether this thing was brought up.

Q. On that occasion did you fix the time when you drew this to Mr. Elman's attention as in May?

(Testimony of Harry F. Rathjen.)

Mr. Naus: No, Mr. Bourquin. I think you are confusing the witness. I think on the May occasion he was speaking about something wholly different which had to do with Mr. Rathjen, the witness, at the suggestion of Mr. Ernest Baer getting from Jean Bercut two cases of assorted wines to be shipped to New York as samples, and that is all the May reference is to.

Mr. Bourquin: May I call the witness' attention to this, this is a transcript of the earlier trial, Mr. Rathjen, and I am looking at page 190. You can look at anything you want, but I want to draw your attention to this, this was Mr. Naus' cross examination. [234]

Mr. Naus: One moment. Before Mr. Bourquin starts reading, this is his own witness. Are you reading for the purpose of impeaching—

The Court: I don't think it is necessary to read it. You can show the witness the transcript. [235]

The Court: I do not believe it is necessary to read it. Show the witness the transcript of testimony.

The Witness: Well—

Mr. Bourquin: Q. I haven't asked you any question.

A. There is a difference in months there—is that what you are referring to?—the fact that May is designated there? At that time I just went by memory. I didn't have any way of determining just when it was.

(Testimony of Harry F. Rathjen.)

Q. At the time that you said in answer to Mr. Naus that your contact with Mr. Elman was in April, then you said in May it was when he was here, at at time you were going by memory; is that true? A. Yes.

Q. What has transpired between to change your memory from that occasion in September of last year and today?

A. This letter is dated May 5.

Q. The letter is dated May?

A. Yes, and I know I had been to the winery before that letter was written, naturally, or I wouldn't have been able to describe it to Mr. Elman, and secondly, we did know from—I am sure we did speak verbally about this wine before I wrote that letter.

Q. Yes, but the question now has become: How long before? The last time you indicated it was within five days, and today you surprise us with a statement that you thought it was a few days after the time that you saw them, around April 20 or before.

Mr. Naus: If the Court please, I object at this point because we now very clearly have reached a very extended cross examination of his own witness.

The Court: Well, it is. I think Mr. Bourquin is endeavoring to clear the matter up, and that is all he is doing, and it seems to me the letter is the best evidence here. The letter [236] very definitely states

(Testimony of Harry F. Rathjen.)

when this witness saw Mr. Elman—two weeks before May 5.

Mr. Bourquin: No, the letter, your Honor, says he saw Peter Bercut and the wines were offered to him over two weeks ago, in a letter dated May 5.

The Court: Yes.

Mr. Naus: If the Court please, he also testified by coincidence he saw Elman at the same time.

Mr. Bourquin: The letter doesn't say so.

Mr. Naus: You and I have the advantage over Mr. Bourquin, your Honor, because we were here at the former trial and he was not, and you will recall, and the record shows, that when Mr. Rathjen took the stand before he brought no record with him, none was shown him, and he was attempting to answer from memory offhand. What has happened during this trial is there has been produced by the plaintiff earlier in the case a letter which the witness recognizes and which itself fixes the date that he was groping for in memory before.

The Court: Q. What is your best recollection about this matter, Mr. Rathjen?

A. I would say I would have to correct the previous testimony to April, I should say.

Q. You think if you said May at the last trial you were mistaken?

A. I was probably mistaken by a few days. It was probably the latter part of April.

Q. Your best recollection is now that you saw Mr. Elman in April? A. Yes.

(Testimony of Harry F. Rathjen.)

Q. Around April 21, is that so?

A. Yes, your Honor.

Q. Did Mr. Elman call upon you?

A. Yes, your Honor.

Q. He called at your place of business?

A. That is right.

Q. Was he seeking to buy wine?

A. We had been buying from them. [237]

Q. Buying from whom?

A. From Park, Benziger. We were one of their customers. We had purchased liquor from them, and he said that he was out here also looking for wines for the eastern market.

Q. And you then told him about the P. & J. wine, did you? A. Yes, your Honor.

Q. And that you had been to see the wine?

A. Yes, sir.

Q. Did he tell you he knew about that wine?

A. He didn't say anything.

Q. He didn't say anything? A. No.

Q. Did he ask you to see if you could buy 5,000 cases of this wine for him?

A. Yes, your Honor.

Q. And submit a letter to him about it?

A. Yes, your Honor.

Mr. Bourquin: Just a question or two, your Honor, if I may.

Q. This letter that we refer to here, Plaintiff's Exhibit 10, a photostat of your letter of May 5, you

(Testimony of Harry F. Rathjen.)

did not mail that letter; you delivered that letter to Mr. Elman, didn't you? A. Yes, sir.

Q. You delivered it because he asked you to prepare a letter reducing your information to writing so that he would have it, didn't you?

A. Yes, sir.

Q. Now, then, how do you fix, with this letter or without it, your talk with Mr. Elman as two weeks before this letter and not just before the letter?

Mr. Naus: Now we are resuming cross examination.

The Witness: It mentions something there in the letter about two weeks previous.

Mr. Bourquin: May I read this letter, your Honor?

The Court: Yes, read it. [238]

(Plaintiff's Exhibit 10 was read by Mr. Bourquin.)

The Court: Do you wish to ask the witness any questions?

Mr. Bourquin: Yes.

Q. Let me call your attention to the last paragraph of that letter?

"Since this merchandise was offered to us by Mr. Mamberger, of Fruit Industries over two weeks ago, you of course understand that I would have to find out if this lot is still available to me, so I can only offer it subject to my having it confirmed."

Does that help you determine when it was you

(Testimony of Harry F. Rathjen.)

talked to Mr. Elman concerning the substance of that letter?

A. Well, Mr. Mamberger offered us this wine, according to the letter, two weeks prior to May 5.

Q. Over two weeks?

A. Over two weeks, yes. Sometime in that two weeks—within that two weeks, Mr. Bercut called for me and took me down to see the wine, and sometime later on after that Mr. Elman came in and the conversation took place. I offered him some of these wines and he asked me to write a letter—make it in writing.

Q. Did you do it? A. Which I did.

Q. Then? A. Yes.

Mr. Bourquin: No further questions.

Mr. Naus: No questions.

The Court: I think we will continue the trial now until two o'clock.

Mr. Bourquin: All right, your Honor.

The Court: Remember the admonition heretofore given, ladies and gentlemen of the jury. We will be in recess until two o'clock. The jury may now retire.

(Thereupon a recess was taken until 2:00 p. m. this date.) [239]

Afternoon session, Thursday, March 16, 1943,
2 P. M.

MARCEL LUSINCHI,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you state your name to the Court and jury, please? A. Marcel Lusinchi.

Direct Examination

Mrs. Herzig: Q. Mr. Lusinchi, will you please state your business?

A. Division Merchandise Manager, City of Paris Dry Goods Company.

Q. How long have you held that position?

A. Around nine years.

Q. Do you live in San Francisco? A. Yes.

Q. Now, Mr. Lusinchi, in your position have you purchased wines which have been made in the State of California? A. Yes.

Q. Over the last eight or nine years?

A. Yes.

Q. Are you familiar with the conditions in the market on wines?

A. At the present time? A. Yes.

Q. Were you familiar with those conditions in January of 1943? A. Yes.

Q. And throughout the year 1943? A. Yes.

Q. Did you know about the market conditions in the fall of 1942? A. Yes.

Q. Would you state what was happening about that time?

A. Well, at that particular time, due to conditions in Europe, there was a shortage in this coun-

(Testimony of Marcel Lusinch.)

try, and the market tended to rise, and there still is a shortage of California wines in the State today.

Q. What effect did that have on the price of wines in general?

A. The wines started to increase in price.

Q. Are you familiar with wines produced in California which are [240] aged in bottles?

A. Yes. Most of the major wineries give their wines a certain amount of bottle aging.

Q. What wineries would you say do that, in particular?

A. Well, I would say the major wineries, Beaulieu Vineyard, Concannon, Wente Bros.

Q. Did you know about wines which the Bercut Bros. had?

A. Yes, I know about those wines.

Q. Were you familiar with the way in which they stored and racked their wines? A. Yes.

Q. Would you say that that was in a way these other wineries have handled their wines?

A. As far as the bottle aging, yes.

Q. Yes. What would you say about the prices of the Beaulieu wines during 1943?

Mr. Naus: One moment. Objected to upon the ground that the question calls for matters that are outside of the issues in this case.

The Court: Sustained.

Mrs. Herzig: Your Honor, we should like to have an opportunity to discuss that matter, and I therefore would like to suggest that the jury be excused while we——

(Testimony of Marcel Lusinchi.)

The Court: Not at this time. You may proceed. I may hear you later on that, if you wish.

Mrs. Herzig: Then may we have the opportunity to recall any witness on that point?

The Court: Yes, certainly, if I rule the other way, but I don't think I will.

Mr. Bourquin: Would your Honor permit me—

The Court: We are only concerned here, are we not, with the profit as far as it related to the contract stated in the complaint? [241]

Mrs. Herzig: It is my understanding that we are concerned with the loss to the plaintiff due to the breach of the contract.

The Court: Yes.

Mrs. Herzig: And that that can be shown in a number of ways.

The Court: The loss of profits; that is the question, is it?

Mrs. Herzig: Well, I interpret loss in a more broad sense than that.

The Court: The objection is sustained; the ruling will stand. You may have an exception. Proceed. The question you asked was the price on Wenté wine. We are not concerned with the price on Wenté wine, or any other wine.

Mrs. Herzig: Q. Would you give us the price at which wine comparable to the Bercut wine was selling for in April of 1943?

Mr. Naus: Same objection.

The Court: Sustained.

Mrs. Herzig: Q. Mr. Lusinchi, did you partici-

(Testimony of Marcel Lusinchi.)

pate in a transaction on behalf of the Bercut Bros., or P. & J. Cellars, with the Utah Liquor Authority in 1943?

Mr. Naus: If the Court please, before making an objection that I am about to make, I will inform your Honor that at the former trial this witness referred to a matter of that nature that did not occur until, as I recall, about September of 1943. Having that in mind, and knowing that that is undoubtedly what Mrs. Herzig has in mind, I object to that question also as being outside the issues.

The Court: It is outside the issues. Objection sustained.

Mr. Bourquin: Exception.

The Court: Let it be understood an exception is noted to each and every ruling of the court.

Mrs. Herzig: That is all. Have you any cross examination? [242]

Mr. Naus: No questions.

Mr. Bourquin: We will call Mr. Jean Bercut to the stand.

JEAN BERECUT,

called as a witness on behalf of plaintiff; sworn.

The Clerk: Your name is Jean Bercut?

A. Yes.

Mr. Bourquin: If your Honor will permit me, in line with the discussion that has come up now on the question of law, may I say to your Honor that first and primarily from this witness we propose

(Testimony of Jean Bercut.)

to show as evidence of the value of these wines at the time of the successive deliveries owing under the contract the prices at which the defendants sold the same wines by way of showing as the Code section 1787 provides, the damages proximately resulting to the plaintiff from the breach of the contract. That is along the lines that Mrs. Herzig suggested to your Honor, and that we might, if your Honor disagrees with our view of the matter, we would like an opportunity to be heard further on the authorities, because, as I say, we do offer to show, as your Honor said, it is a loss of profit, but it is primarily a loss, and to show that we propose to show the value of these goods at the time of the deliveries owing under the contract.

The Court: You may proceed.

Mr. Bourquin: Q. Mr. Bercut, you are one of the defendants in the action? A. Yes.

Q. You and your brother, Peter Bercut, are associated in this particular business under the name of P. & J. Cellars, are you? A. Correct.

Mr. Bourquin: Your Honor, may the record show that the witness is called under provisions of section 2055 of the Code of [243] Civil Procedure, with the right of the plaintiff to impeach his testimony?

The Court: Oh, yes.

Mr. Naus: If the Court please, 2055 of the State Code has no bearing on any trial in this case.

The Court: Well, we have a provision.

(Testimony of Jean Bercut.)

Mr. Naus: There is a separate Federal rule and I think it is similar to 2055.

The Court: Yes, quite similar. The provision of the Federal rule is quite similar. You may proceed.

Mr. Bourquin: Q. Mr. Bercut, calling your attention to the particular wines specified in the contract that is here in evidence as Plaintiff's Exhibit 2, namely, the 7000 and some odd cases of burgundy, 7000 and some odd claret, six thousand some odd Rhine wine, Sauterne 4000 and some odd, sherry and port, you have those wines in mind, have you Mr. Bercut? A. Yes.

Q. May we ask you for our record which of those wines are to be denominated or characterized as sweet and which as dry wines?

A. The Burgundy is dry wine.

Q. Burgundy is dry wine?

A. Sauterne is dry.

Q. Sauterne is dry? A. Claret is dry.

Q. Claret is dry. What about Rhine wine?

A. Rhine wine is also dry wine.

Q. That is also dry? A. Yes.

Q. The sherry is what, sweet?

A. Sweet wine.

Q. The port is sweet? A. Yes.

Q. And they were so characterized at the time of the execution of the agreement that is referred to? A. Yes.

Q. Following the month of April, and particularly the 27th day of April, 1943, did you sell those wines in the open market? [244]

(Testimony of Jean Bercut.)

Mr. Naus: Objected to as immaterial, and as being wholly outside the issues.

The Court: Sustained.

Mr. Bourquin: We may have an exception to the ruling, your Honor?

The Court: Yes.

Mr. Bourquin: Q. What was the value in the market of the dry wines specified in the contract to which I have referred, in the month of May, 1943?

Mr. Naus: The same objection.

The Court: Overruled.

The Witness: Should I answer that?

The Court: Yes. Read the question.

(Question read.)

A. Well, it should have been around \$6 a case.

Mr. Bourquin: Q. \$6 a case?

A. Yes, about that.

Q. What was the value in that month of May, 1943, of the sweet wines specified in the agreement to which I have referred?

Mr. Naus: The same objection.

The Court: Overruled.

A. About 25 cents a case higher.

Mr. Bourquin: Q. \$6.25?

A. Yes, something like that.

Q. What was the value of the same dry wines specified in the agreement referred to in the month of June, 1943?

Mr. Naus: One moment. Objected to, first, as

(Testimony of Jean Bercut.)

immaterial, and, second, as outside the issues, and, thirdly, as speaking of a market in June after an alleged election to treat the alleged repudiation on April 27, 1943 as a breach.

The Court: Sustained on the last ground.

Mr. Bourquin: May I make the same offer of proof as to the [245] value of the wines specified in the contract in the market in the succeeding months following June, 1943, and running down to date?

The Court: Yes. The ruling will be the same if the objection is the same.

Mr. Naus: The objection is the same.

The Court: Are you satisfied with that?

Mr. Bourquin: Well, I am not satisfied, your Honor——

The Court: I mean so far as what the record will disclose.

Mr. Bourquin: Well, I think if we may have a stipulation, Mr. Naus, that the same objection you would desire be offered if we offer the same question——

The Court: From June to date?

Mr. Bourquin: From June to date.

Mr. Naus: As far as it is within the power of counsel to concede or stipulate to that effect I do so.

The Court: Very well. The same ruling and exception noted.

Mr. Bourquin: Your Honor, I feel that I have encountered a ruling that perhaps to the questions to be properly put before the jury where objections

(Testimony of Jean Bercut.)

would be sustained and I have exhausted our position. I would like to make an offer of proof and I was sure that perhaps something would be made in the absence of the jury.

The Court: Well, you have suggested this method of shortening the examination and it has been accepted. Now, do you wish to pursue it further?

Mr. Bourquin: If your Honor stays with the ruling I am not able to go beyond it.

The Court: I don't know what it is you are driving at.

Mr. Bourquin: Well, then, I think I can make a statement [246] in general terms to which there would be no objection, without mentioning the prices.

The Court: Yes.

Mr. Bourquin: And I desire to offer to prove the prices, first, I will say, the value in the market of the wines specified in the complaint for each and every month commencing with May, 1943, and running down to date, likewise to prove the prices at which the wines were sold in the open market over each of the months mentioned, and running down including to date. That is what we desire to offer to prove, and to prove in addition to that, may I say, the differential, if any, between the contract price and those prices, of course, maintaining that there was and we offer to prove the differential.

Mr. Naus: So the record may be perfectly clear,

(Testimony of Jean Bercut.)

I assume that when you use the word "sale" in the offer of proof that you have just made you do not mean a sale by the plaintiff, Park, Benziger & Co.; you mean a sale by the Bercuts?

Mr. Bourquin: Well, a sale of these particular wines, as far as I am aware—I think we can say if it is not Bercuts, at least it is not Park-Benziger——

Mr. Naus: Well, I just want to clear this up.

Mr. Bourquin: I do mean the Bercuts, yes.

Mr. Naus: When you speak of a sale you do not mean a resale that might evidence a basis for calculating price by Park-Benziger to somebody else——

Mr. Bourquin: Yes. This would furnish a basis to that.

Mr. Naus: Well, I object upon the grounds heretofore stated. I think the record is clear.

The Court: Objection sustained.

Mr. Bourquin: Exception, your Honor please.

[247]

The Court: Yes.

Mr. Bourquin: One question further, your Honor, in accordance with your Honor's ruling.

Q. You told us, Mr. Bercut, that the value of the wines specified in the complaint in the month of May, 1943, the value in the market was \$6 for the dry wines, \$6.25 for the sweet; is that true?

Mr. Naus: Objected to as repetitious, and objected to upon the further ground that it is now the intent to inquire further about value at a date sub-

(Testimony of Jean Bercut.)

sequent to the date elected by the plaintiff as a breach, to wit, April 27th.

The Court: Are you adding something to it? Did you add to it the month of May?

Mr. Naus: Yes.

Mr. Bourquin: Perhaps, your Honor, that is correct. I formerly did ask him for the month of May.

The Court: Objection sustained.

Mr. Bourquin: All right, your Honor; exception. Because I misunderstood that when I asked the question I will ask this, Mr. Bercut:

Q. Will you tell us what was the value in the market of the wines specified in the complaint, to wit, the month of April up to and including April 27th?

The Court: Hasn't he already done that?

Mr. Bourquin: He said May, your Honor, before. I said May.

The Court: Well, I thought you asked him at the time the contract was made.

Mr. Naus: No. At this time, if the Court please, in view of the apparent misunderstanding in the record, I now move the court to strike out the previous answer given a while ago by the witness [248] with respect to that value in the market in the month of May, 1943, and to which he answered six dollars, upon the ground that the objection that has been made should have been sustained, and upon the further ground it relates to a date other than the day of breach.

(Testimony of Jean Bercut.)

The Court: Well, I suppose for the purpose of clearing the record so there will be no misunderstanding, that that motion ought to be granted. It is granted and you may proceed with your examination.

Mr. Bourquin: And we may have an exception to that ruling?

The Court: Yes.

Mr. Bourquin: Thank you.

Q. Mr. Bercut, the last question—I will repeat it—

The Court: No. You may just continue. Reframe your question.

Mr. Bourquin: Yes, your Honor.

The Court: As if you had not asked any question about the value of the wine.

Mr. Bourquin: All right.

Q. Mr. Bercut, do you know what was the value in the market of the wine specified in the agreement here, Plaintiff's Exhibit 2, that I have exhibited to you, during the month of April, 1943, up to and including the 27th day of that month?

Mr. Naus: Objected to, first, as immaterial; second, as outside the issues; and third, as an attempt to go outside the basis of the claim here, to-wit, to base the loss of profit which must be proved by a wholly different method.

The Court: Overruled.

A. The only way you can find out the value—

The Court: Q. No. Answer the question as

(Testimony of Jean Bercut.)

directly as you can. [249] If you wish to explain it, you may. What was the value? You understand the question asked by Mr. Bourquin was as to the value of the wine.

A. The dry wine, it was a good price at \$5.25 a case that month.

Mr. Bourquin: Q. What about the sweet wines?

A. Sweet wines, twenty-five to fifty cents higher in the market in the month of April.

Mr. Bourquin: If your Honor please, will you bear with me just one moment? I would desire, at the instance of my associate, to complete the offer of proof and have marked as an exhibit for identification and to be considered as a part of the offer of proof the document that I have given Mr. Naus.

Mr. Naus: I would make no objection, because I could not possibly make any objection, your Honor, to something being marked for identification. If counsel is now seeking to enlarge his offer of proof, I take it for granted your Honor would permit him to do it. He handed me a photostat of a statement that was referred to on the trial, and your Honor will recall the defense prepared and gave to them, and I have no objection to stating, only for the purpose of informing your Honor what we are talking about, that this purports to show all sales by the defendants to persons other than the plaintiff, or Mr. Serge Hermann, or Mrs. Hermann, of the wine in suit, and any other wine which they sold since, down to the present date.

(Testimony of Jean Bercut.)

You are merely asking to mark that for identification, to be considered in your offer of proof?

Mr. Bourquin: Yes.

May I ask Mr. Naus a question off the record, your Honor?

The Court: Yes.

Mr. Bourquin: If it meets with your Honor's consent, I will [250] ask to mark for identification this ledger sheet or schedule that Mr. Naus has referred to, and I would just desire to incorporate it in the offer of proof with the statement additionally, or rather, the stipulation, if it may be such—that is, if Mr. Naus would be kind enough to give it to me—that in the several columns dealing with the type of wines specified in the contract this schedule shows the sale of those wines in the amounts shown by this schedule, the same wines.

Mr. Naus: I concede that in a limited sense; I will not make a concession of fact in the case generally, but for the purpose of enabling you to shorten and simplify your offer of proof, and to identify the wines mentioned in the exhibit for identification.

The Court: It may be marked for identification.

(The documents referred to were marked Plaintiff's Exhibit 13A for identification.)

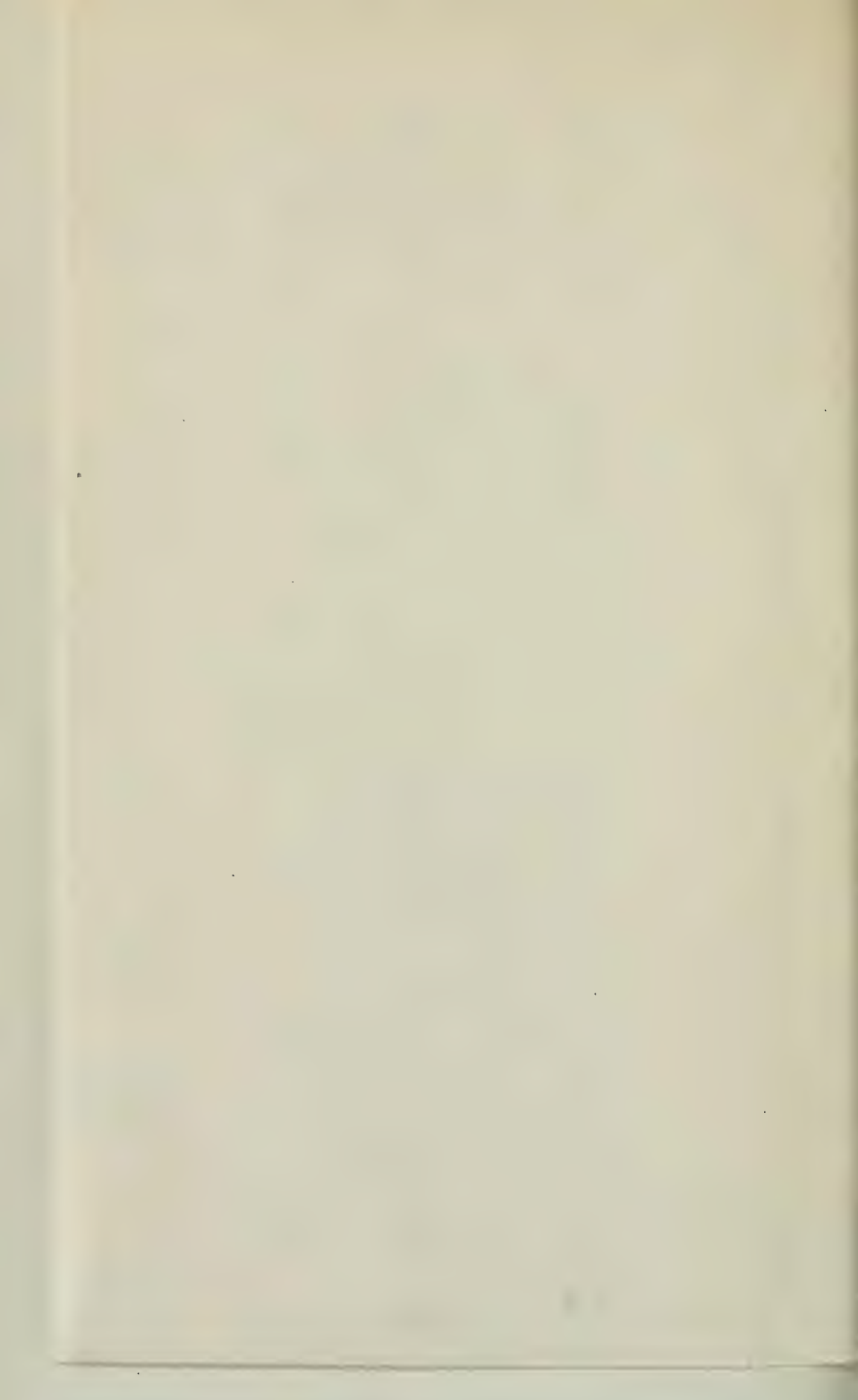
P. & J. CELLARS—ANALYSIS OF WINE SALES

Date	Sold to	Explanatory	No. of Cases	Ber-gundy	Claret	Rhine	Sau-terne	Sherry	Port	Crate D'Ordo Obsolete Type	Tipa	P. I. Cham-pagne	Golden State Cham-pagne	Dry Ver-mouth	Sweet Ver-mouth	Carbon-ated Wine	Price Per Case	Total
1942:																		
9/30	Alpha Distributing Co.	Sample (red)	2							2							\$5.50	11.00
9/30	Scandia Commercial Co.		10							10							6.00	60.00
10/23	Scandia Commercial Co.	Sample (White)	6							6							6.00	36.00
11/20	City of Paris		25							25							6.00	150.00
12/23	Jean Berout		43								43						6.00	258.00
1943:																		
3/4	Park Benziger Co.		1076							1076							6.50	6,994.00
3/27	Park Benziger Co.		882							882							6.00	5,292.00
6/12	Park Benziger Co.		1064							1064							6.50	6,916.00
6/11	Polak Winters		600											300	300		7.75	4,650.00
6/19	The Livelys Trading Co.	Undelivered 2/29/44	2100	750	750	250	250	50	50								6.50	13,650.00
6/26	City of Paris		233							233							6.00	1,398.00
7/17	Monarco's Restaurant	Billed 12 cs. @ \$12. pr cs	24	12			12										6.00	144.00
7/21	Cohen's Smoke Shop	" 7 " @ \$12. " "	14	2	2	4	2	2	2								6.00	84.00
7/21	J. L. Feldheim	" 10 " @ \$12. " "	20	4	4	4	4	2	2								6.00	120.00
7/22	Fred Solari's Restaurant	" 5 " @ \$12. " "	10	2	2	2	2		2								6.00	60.00
7/22	Benedetti	" 24 " @ \$12. " "	48	16	4	4	16	4	4								6.00	288.00
7/22	Laubscher Bros.	" 6 " @ \$12. " "	12	2	2	2	2	2	2								6.00	72.00
7/22	Martel's Wine Liquor Store	" 18 " @ \$12. " "	36	6	6	6	6	6	6								6.00	216.00
7/23	Golden Rule Restaurant	" 5 " @ \$12. " "	10	2	2	2	2	2	2								6.00	60.00
7/23	D. Mucunini-Spreckels Mkt.	" 12 " @ \$12. " "	24	4	4	4	4	4	4								6.00	144.00
7/23	Barney's Restaurant	" 5 " @ \$12. " "	10	2	2	2	2	2	2								6.00	60.00
7/23	Harry Rathjen	" 7 " @ \$12. " "	14	4	2	2	2	2	2								6.00	84.00
7/24	Vintage Wines, Inc.	1st car Alabama	1500	200	500	150	250	200	200								7.00	10,395.00*
8/6	Scandia Commercial Co.		6									3	1		2		See (a)	100.50
8/13	Vintage Wines, Inc.	1st car Idaho	1500	400	410	400	185	55	50								7.00	10,500.00
8/20	Vintage Wines, Inc.	2nd car Idaho	1500	400	390	400	215	45	50								7.00	10,500.00
8/20	Sherwood Liquor Co.	F.O.B. Oakland	415	125	125	125		20	20								6.50	2,697.50
8/27	Vintage Wines, Inc.	2nd Alabama car	1500	200	500	150	250	200	200								7.00	10,395.00*
9/1	Harry Rathjen		440	100	100	100	100	20	20								6.50	2,860.00
9/3	Maison Paul Restaurant		12													12	12.00	148.32*
9/15	Vintage Wines, Inc.	3rd Idaho car	1500	600	150	450	200	50	50								7.00	10,500.00
9/17	Vintage Wines, Inc.	4th Idaho car	1500	600	150	450	200	50	50								7.00	10,500.00
9/22	Vintage Wines, Inc.	5th Idaho car	1500	600	150	450	200	50	50								7.50	11,250.00
10/14	Monaco's Restaurant		35									25	10				See (b)	756.65
10/18	Benatar's Drug Store		11									10				1	See (c)	212.39
10/18	City of Paris—Wine Dept.		50										50				25.19	1,259.50
10/27	St. Christopher Wine Co.		237									5				232	See (d)	2,641.28
10/29	Vintage Wines, Inc.	3rd Alabama car	1200	200	500	150	250	50	50								7.50	8,910.00*
11/11	Vintage Wines, Inc.	4th Alabama car	1525	300	600	250	350		25								7.50	11,321.12*
11/12	Universal Wine Liquor Co.	1st car Michigan	1500	670	140	490	200										8.50	12,750.00
11/13	Chakamas Grocery Co.	1st car Oregon	1384	259	200	450	450		25								8.50	11,764.00
11/15	Universal Wine Liquor Co.	2nd Michigan car	1435	605	140	490	200										8.50	12,197.50
11/16	Jimmie's Liquor Store		10										10				25.20	252.00
11/16	W. P. King		10										10				25.20	252.00
11/16	Cal. Liquor Store		5										5				25.19	125.95
11/19	Vintage Wines, Inc.	5th Alabama car	1438	300	563	250	300	5	20								7.50	10,677.15*
11/20	City of Paris—Wine Dept.		200														7.50	1,500.00
11/23	Bel Tabarin		140							140							7.25	1,015.00
11/23	Chakamas Grocery Co.	2nd Oregon car	1475	600	150	425	300										8.50	12,537.50
12/10	Scandia Commercial Co.		11	1										5	5		See (e)	112.50
12/10	Barney's Restaurant		20												20		10.00	200.00
12/10	St. Christopher Wine Co.		28									28					20.19	577.92
12/18	Jimmie's Liquor Store		10										10				25.20	252.00
12/22	Castagnoli Bros.		5										5				25.20	126.00
12/30	Peninsula Liquor Stores		5												5		8.31	41.58
1944																		
1/15	Jimmie's Liquor Store		1										1				25.19	25.19
1/25	Peninsula Liquor Store		5										5				25.19	125.95
2/10	Scandia Commercial Co.		31	10									1	10	10		See (f)	315.10
2/10	Jimmie's Liquor Store		3										3				25.19	75.57
2/24	Grape Empire Wine Co.	Oakland	185	50	50	40	10						25	5	5		See (g)	1,867.25
2/26	Buxton-Smith Co.	Arizona	1250	350	600	150	150										8.50	10,625.00
			29845	7374	6198	5652	4114	821	886	3638	43	71	136	320	347	245		223,111.42

*Denotes 1% Discount

-Denotes 3% Sales tax added

(a) G.S. \$25.00, F.I. \$19.00, Ver. \$9.25 (b) F.I. \$20.19, G.S. \$25.19 (c) F.I. \$20.19, Carb. W. \$10.49 (d) F.I. \$20.64, Carb. W. \$10.49
 (e) Ver. \$10.50, Burg. \$7.50 (f) Burg. \$8.50, Ver. \$10.25, G.S. \$25.19 (g) Old stock \$8.25, Champ. \$25.19 (g) 10 cs. Vermont, no price



(Testimony of Jean Bercut.)

Mr. Bourquin: May it be further understood that we are not asking you for a stipulation that might exceed my privilege, but that we, in connection with the offer, offer to prove that the wines in the several columns shown on the schedule are the same wines specified in the contract, Plaintiff's Exhibit 2?

Mr. Naus: I think that is the whole indication of our colloquy so far.

Mr. Bourquin: Thank you.

One other matter in that connection. I would desire to incorporate into the offer of proof the deposition of Mr. Jean Bercut which was taken, I think, the early part of the week.

Mr. Naus: Let's clear that up. The deposition of Jean Bercut that you speak of is one taken a few days ago, and is limited solely to the subject matter of sales of the wine in suit [251] since the former trial. I will not stipulate that that deposition may be received, but I am perfectly willing to stipulate that it may be pinned to the offer for identification and be part of the identifying matter included in the last part.

Mr. Bourquin: It may be included in the offer of proof.

Mr. Naus: Well, of course, the offer of proof is your own.

Mr. Bourquin: Well, I desire that it may be considered——

Mr. Naus: I will put it this way——

(Testimony of Jean Bercut.)

The Court: I will consider it part of your offer.

Mr. Bourquin: I don't believe that deposition, due to the time element, has been returned by the——

Mr. Naus: Have you got a carbon? Pin it to the other.

Mr. Bourquin: Yes, we have.

Mr. Naus: Pin it to the schedule and let it be part of the identification. [252]

Mr. Bourquin: There are two depositions here, Pierre's and Jean's.

Mr. Naus: They appeared at the same time. Use the whole thing in the same way for identification.

Mr. Bourquin: If we may, your Honor, as part of the offer of proof.

The Court: It will be part of 13 for identification.

Mr. Naus: May the schedule be marked 13-A and the depositions 13-B, merely for identification?

The Court: Very well.

(The depositions were marked "Plaintiff's Exhibit 13-B for Identification.")

PLAINTIFF'S EXHIBIT 13-B

[Title of District Court and Cause.]

DEPOSITIONS OF PIERRE BERCU T AND JEAN BERCU T

Be it remembered, that on Friday, the 10th day of March, 1944, at 11 o'clock A. M., pursuant to

(Testimony of Jean Bercut.)

Order Granting Motion to Take Second Deposition of Defendants and Fixing Limitations, at Room 715 Chancery Building, 564 Market Street, San Francisco, California, personally appeared before me, Thomas A. Dougherty, a Notary Public in and for the City and County of San Francisco, State of California,

PIERRE BERECUT and JEAN BERECUT,

witnesses called on behalf of the plaintiff herein.

George Olshausen, Esquire, Alfred F. Breslauer, Esquire, and Mrs. Thelma S. Herzig appeared as attorneys for the plaintiff; and Louis H. Brownstone, Esquire, and George M. Naus, Esquire, appeared as attorneys for the defendants Pierre Bercut and Jean Bercut, individually and as copartners doing business as P. & J. Cellars, a copartnership.

The said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the Notary Public, after administering the oath to the witnesses, need not remain further during the taking of these depositions.

It was further stipulated that the said depositions should be recorded stenographically by Harold H. Hart, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

him into longhand typewriting, to be read to, or by, the said witnesses, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witnesses shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that if the witnesses should be instructed not to answer questions propounded by counsel, in the absence of the Notary Public, it shall be deemed that the Notary Public has so instructed the witnesses to answer, but that they still refuse to answer.

Mr. Olshausen: Stipulated that the notary may be excused; and if any witness refuses to answer any question, it shall be deemed that the notary has instructed the witness to answer.

Mr. Naus: All right.

Mr. Breslauer: The appearances for the plaintiff, Mr. Hart, are Thelma S. Herzig, George Olshausen and Alfred F. Breslauer.

Mr. Naus: For the defendants are Louis Brownstone and George M. Naus. That is, for the defendants Bercut. We still have quite a bit of fiction; but I am not appearing for them.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

PIERRE BERECUT,

one of the defendants, called as a witness on behalf of the plaintiff, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examination by Mr. Breslauer:

(Unreported discussion.)

Mr. Breslauer: Have you a copy of this analysis of the wine sales that you can hand to Mr. Peter Bercut so he can refer to it, and I will have mine here?

Mr. Brownstone: You have got two. Why don't you give him one.

Mr. Breslauer: Q. Mr. Bercut, I hand you a computation entitled P. & J. Cellars, analysis of wine sales, and ask you if you recognize that as the analysis of the sales of wine made by the P. & J. Cellars?

Mr. Naus: One moment. If you will limit your question to analysis of sales since the former trial, there will be no objection.

Mr. Breslauer: Q. Well, now, Mr. Peter Bercut, referring to sales after September 22, 1943.

(The witness starts to talk to Jean Bercut.)

Mr. Naus: Just a moment. Jean, Peter Bercut is now a witness, and you shouldn't talk with him while he is a witness. Just sit back, and he will answer the questions.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Mr. Jean Bercut: He asked me a question.

Mr. Naus: I know, but there should be no talk between the witness and anyone else bearing on a question unless the other side wishes it and I wish it.

A. I have no knowledge of this business here.

Mr. Breslauer: Q. You are a partner of the P. & J. Cellars? A. Yes.

Mr. Naus: One moment, please. Now, that refers to sales happening since the former trial. Let us not go into the partnership and the like.

Mr. Breslauer: Q. Since September 28th, 1943, have you been a partner of P. & J. Cellars?

A. Yes.

Q. Did you make any sales of wines for P. & J. Cellars after that date?

A. No, sir, not myself.

Q. Did any employees under your direction make any sales?

A. My associate, Jean Bercut, made sales.

Q. Did you offer the wine to anybody for sale?

A. No.

Q. Did any employee under your direction offer the wine for sale to anybody?

A. I have no employee salesmen, myself.

Q. Did you fix the price of wine——. Let it be understood that my questions all refer to the events subsequent to September 28th, 1943, so I won't have to repeat it.

Did you fix——

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Mr. Naus: One moment. Does that refer to all sales of wine under the Herman contract?

Mr. Breslauer: No, I will refer to that specifically when I do.

Q. Did you fix the price for the sale of wine referred to in the Herman contract?

A. We did.

Q. Now——

A. You mean to Herman himself?

Q. No, after September 28th, 1943?

A. After September 28th, 1943.

Q. After the last trial that we had in this case, did you fix the price of wine? A. No.

Q. Do you know anything about the sale of wines to the Vintage Wines on October 29th?

A. No.

Q. Referred to as the 3rd Alabama car?

A. No.

Q. Did you have anything to do with that sale?

A. No.

Mr. Naus: One moment. Do you mean did he have anything to do after the last trial took place? It may or may not have been a sale that was made before the last trial.

Mr. Breslauer: Q. Did you have anything to do with the sale after the last trial? A. No.

Q. Referring to the sale on November 12th, Universal Wine Liquor Company, 1st Michigan car, did you have anything to do with that sale?

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

A. No.

Q. Refer to the analysis which I have handed to you there, and look at all of the sales subsequent to September 22nd, and tell me if you had anything to do with any of those sales?

Mr. Naus: You mean anything to do after the former trial with them?

Mr. Breslauer: After the former trial.

A. No.

Mr. Breslauer: Shall we mark that analysis of wine sales as Exhibit "A" for identification for the purpose of an exhibit?

Mr. Naus: No reason why we shouldn't.

Mr. Breslauer: All right. Mark it for the purpose of this deposition.

(P. & J. Cellars analysis of wine sales was marked "Plaintiff's Exhibit A for identification," to be attached to the original.)

Mr. Breslauer: Q. Did you make this analysis up, Mr. Bercut? A. No.

Q. Who made this analysis up?

A. My office. I think it was prepared by——

Mr. Naus: My understanding is that it was prepared by Mr. Evans.

Mr. Breslauer: Mr. Evans.

Q. Did you have anything to do, Mr. Bercut, with the payment of commissions on these sales?

Mr. Naus: One moment. That assumes that commissions were paid on sales subsequent to the former

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

trial; and as long as it contains that unproved assumption, I don't think the witness need regard the question.

Mr. Breslauer: Q. Were any commissions paid on any sales after September 28th, 1943?

Mr. Naus: You mean commissions paid after the former trial, or commissions on sales made after the former trial?

Mr. Breslauer: Commissions on sales made after the former trial. A. I don't know.

Q. Were any commissions paid on sales which had been accepted prior to the last trial but delivery made afterwards?

A. I would have to refer to the bookkeeping. I don't know that.

Q. Did you make any agreement with any broker or any individual for the payment of the commission on the sale of wines since the last trial?

A. Not myself.

Q. Do you know who did?

Mr. Naus: One moment. That assumes someone did.

Mr. Breslauer: Q. If anybody did, do you know who did?

A. That would be Jean Bercut. Nobody else could do it.

Q. Mr. Bercut, referring to Exhibit "A", will you look at the sales after September 22nd, and tell me if you know of any commissions paid on any sale listed on that exhibit?

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

A. I wouldn't know. I would have to refer to the bookkeeping. Absolutely, I can't give you any information that way, because I don't have it. It would be the most unreliable information you could get. You would have to refer to the bookkeeping.

Q. Have you your books with you on sales since the last trial? A. No.

Q. Or commissions paid? A. Not me.

Q. Well, has Mr. Jean Bercut the books with him?

A. He will testify for himself. I don't know.

Mr. Breslauer: Mr. Brownstone, have you got the books which would show whether or not commissions have been paid on the sales since the last trial?

Mr. Brownstone: No, we did not under the subpoena that was served. That is not required in the subpoena.

Mr. Naus: We have not moved our offices up here, Mr. Breslauer.

Mr. Breslauer: I didn't expect you would. Where is the subpoena?

Mr. Olshausen: As I understand it, we called your office and asked whether you would bring the same ones you had on the previous deposition subject to——

Mr. Brownstone: And I answered no to the question, subject to the limitation that the documents called for in the subpoena would be supplied with reference to sales after the last trial.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Mr. Naus: In other words, the duces tecum has been regarded for practical purposes to be still in existence?

Mr. Olshausen: Yes.

Mr. Naus: That is, whether it is technically or not; but we read it under the limitation for the taking of the deposition.

Mr. Olshausen: That's right.

Mr. Naus: The only thing is that you gentlemen carry in your minds the thought that thus limited that you somehow may call for documents that may exist when you only imagine that they do exist.

Mr. Olshausen: In other words, your statement is that no such documents exist?

Mr. Naus: My statement is that the matter was fully covered in the letter Mr. Evans handed to the court at one of our sessions, which a copy was given to you, and which covered this matter fully; and my statement is based upon that, and also upon the statement that I made to the court.

Mr. Olshausen: Is your statement that there are no original documents in existence?

Mr. Naus: Mr. Olshausen, are you taking my deposition or the witness's deposition? Are you seeking to find what the limit and scope of your subpoena duces tecum is? We have told you two or three times this morning that so far as we know, no commissions were paid on sales subsequent to the former trial; but, however that may be, it must have

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

been obvious to you at the first trial, and it surely ought to be obvious to you now that the present witness you have attends to none of these sales, and knows nothing about them. Why don't you turn to some other witness who has something to do with it and ask him about it?

Mr. Olshausen: You volunteered some statements about books——

Mr. Naus: All right. If we are going to get into an argument about it, I withdraw any statement I have made so far this morning, and leave you on your own from now on in.

Mr. Brownstone: And suppose you withdraw my remarks, too.

Mr. Naus: Yes, they are withdrawn, too.

Mr. Breslauer: Q. I asked you, Mr. Peter Bercut, to produce the records of sales of wine described in the contract, and being the sales since the last trial. Where are those records?

Mr. Naus: That question, Mr. Bercut, can be disregarded for the reason that counsel's question would call for sales of champagne, sparkling wine and of Chianti type as well; and I may say this to you, Mr. Breslauer, that we have with us what we understand to be all records in response to this duces tecum as to still wine, California wines, but not for the Chianti type sold since the former trial.

Mr. Breslauer: I read the subpoena, "the sales of wines described in the contract" is what my question included.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Mr. Naus: I didn't so understand it. If you wish to limit your question to that, he may answer.

Mr. Breslauer: I read from the subpoena, and the phrase was in there "described in the contract." I am asking for the records of the sale of wine described in the contract since the last trial.

Mr. Brownstone: There is no limitation in the subpoena. You call for the records showing the amounts, the price, to whom sold and so forth, the quantity of wine sold by the defendants, together with the delivery slips showing the deliveries.

Mr. Naus: I believe we brought all those, so far as we know of.

Mr. Brownstone: I believe we have them here.

Mr. Breslauer: Could I see the record of sales made from the time of the last trial?

Mr. Naus: We will hand you the records, but we will not turn them over to be filed with the deposition, because we want to use them between now and the time of the trial; but you can look them over and satisfy yourself. I will ask you that you keep them in their order or sequence that you find them, because it is difficult to handle them once they are disarranged.

(Documents handed by Mr. Naus to counsel for plaintiff.)

Mr. Naus: Gentlemen, what is this, an inspection of papers or taking a copy of them here? Is that the purpose of this examination?

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Mr. Breslauer: Inspection for the purpose of examination.

Mr. Naus: I will suspend this deposition very shortly if you don't go forward with it and ask questions; I will do it within the next two minutes if you don't commence asking questions.

Mr. Breslauer: Q. I will ask you to look at that file of papers, Mr. Bercut; and ask you if you recognize those papers?

A. The bill of lading. Shipment of wine. Bill of lading for a shipment of wine. I signed a lot of those.

Q. Do you know anything about that transaction?

A. No, I just signed the bill of lading. Some, I think—I think practically all the bills of lading are signed by me. I don't know. I was out in the office, and I signed them when they were presented to me for shipping.

Q. Did you give the orders for the preparation of the bill? A. No.

Q. You say that if there was any commission—if there was any deal made for a commission, that Mr. Jean Bercut would be the one that would make it?

A. I don't say that. I say I didn't make it myself?

Q. You didn't make it yourself? A. No.

Mr. Breslauer: That is all of Mr. Peter Bercut.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

JEAN BERCUT,

one of the defendants, called as a witness on behalf of the plaintiff, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Examination by Mr. Breslauer

Mr. Breslauer: Q. Referring to Exhibit "A", Mr. Bercut, the item under date of October 29th—

A. May I see the copy there that is marked off? October is the tenth, is it?

Q. 10/29. A. 10/29. Yes, I see.

Q. Do you know anything about that sale?

A. Yes.

Q. Did you make that sale? A. Yes.

Q. Who was the purchaser?

A. Henry Behr.

Q. Henry Behr. That is the Vintage Wines?

A. Vintage Wines, yes.

Q. Was Henry Behr the purchaser for the Vintage Wines? A. Yes.

Mr. Naus: One moment. One moment, please. I again point out to you that the questions should be limited also to events occurring subsequent to the former trial.

Mr. Breslauer: Q. Referring to that date, October 29th, Vintage Wines, 3rd Alabama car, was that car shipped on that date? A. Yes.

Q. Did you prepare this analysis, Exhibit "A"?

A. No. Our bookkeeper did.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Q. Are you acquainted with the items on it?

A. Yes.

Q. When was the order accepted, if there was any order, for that item of 10/29?

A. I wouldn't remember the date; but it is long previous to that.

Q. Shipment was made on that date?

A. Yes. Is the date there? You may find it there. Have you the bill of lading?

Mr. Naus: They are getting them out of order.

Mrs. Herzig: They were out of order.

Mr. Naus: I had examined them personally before we came over here, and found that they were all arranged in chronological sequence with the earliest date on top. Since we have been here, they have been shuffled and different persons handling them, and they are disarranged.

A. That's right, October 29th, 1943.

Mr. Breslauer: Q. When was the order on that accepted?

Mr. Naus: One moment, please. Again I point out that if you will limit the question to after the former trial, that it will not be objected to.

Mr. Breslauer: Withdraw the question.

Q. Look at those documents, Mr. Bercut, and tell me what occurred in connection with that sale since the last trial?

A. Well, the delivery was made; and the sale of

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

it too—I don't know when, or the day delivery was made. Does it say anything there?

Q. You look at it and you tell me if there is anything in those records which you have before you which tell you if any order was received since the last trial?

Mr. Naus: Well, there again I would like to know what you mean: Whether this car was shipped under a sale made some months earlier or whether it was an order buying wine in the first instance.

Mr. Breslauer: I am proving that.

A. That was part of the sale. I don't remember——

Mr. Breslauer: Q. Part of the sale made when?

A. Well, I will have to look that up. I don't know that. The date I don't know. I don't know when that was sold.

Mr. Naus: He wouldn't know whether it was before or since the former trial.

A. I wouldn't know that. I wouldn't know that.

Mr. Breslauer: Q. Was there any commission paid on that sale? A. Yes.

Q. How much of a commission was paid on that sale?

A. Let me see that, and I will tell you. \$1.00. \$1.00 a case.

Q. \$1.00 a case? A. Yes.

Q. Was that shipment made directly to the State of Alabama Liquor Control? A. Yes.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Q. Did the State of Alabama liquor authority make payment to Bercut Brothers?

A. I think Behr paid us. Let's see, how was it now. Yes, Behr paid us. He paid us.

Q. And how much did Behr pay you?

A. \$7.50.

Q. He paid you \$7.50?

A. Yes. He paid us \$7.50 net.

Q. Referring now to the item of November 11th, Vintage Wines, 4th Alabama car, I will ask you if there was a commission paid on that sale?

A. No, we received——. I see now the thing here. We received \$7.50 net. No commission was paid. \$7.50 net from both lines.

Q. \$7.50? A. Yes.

Q. Was the dollar commission that you testified to before that was paid to Mr. Behr, was that on any other sales since the last trial?

A. I will tell you as we go along. All depends upon the price; but we got \$7.50 net on both of those cars. That is what we got.

Q. On both of those cars? A. Yes.

Q. You got \$7.50 net?

A. That was paid by Behr.

Q. Paid by Mr. Behr? A. Yes.

Q. You received no money from the Alabama Liquor Control?

A. I will be sure; but I don't—I believe Behr paid. He paid it, yes.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Q. Let us refer to the item of November 12th, Universal Wine Company, 1st car Michigan.

A. Yes.

Q. And I will ask you if there was any commission paid on that sale?

A. It is also figured \$7.50 net. What does yours read, \$7.50 or \$8.50, according to your ruler there?

Q. According to my ruler, it is \$8.50.

A. \$8.50. Yes. That is a commission of a dollar that was paid on that.

Q. What was that commission paid to?

A. Behr. Henry Behr.

Q. That was paid to Behr? A. Yes.

Q. P. & J. Cellars received how much cash?

A. Well, we got the figure, \$12,750.00.

Q. The dollar that you paid to Behr, did that come out of the \$12,750.00? A. Yes.

Q. Referring now to the item of November 13th, Clackamas Grocery Company, 1st car Michigan; and I will ask you if there was any commission on that sale? A. Yes.

Q. What was the commission paid to?

A. Can I ask—

Mr. Naus: No, no. You either know or you don't know; so answer it according to what you know.

A. I know the name, but I just forget the name. Let's see now. His name is Morasky.

Q. How much of a commission was paid?

A. Twenty-five cents.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Q. And as shown on Exhibit "A", P. & J. Cellars received \$11,764.00? A. Yes.

Q. Is that correct? A. Correct, yes.

Q. And the twenty-five cents commission was paid out of the—— A. Right.

Q. (Continuing) ——proceeds? A. Yes.

Q. In other words, the purchaser paid for that wine, the purchaser being the Clackamas Wholesale Grocery Company, \$11,764.00, is that correct?

A. Correct, yes.

Q. And in connection with my questions of what you did on the previous transactions, you would testify that the purchaser of the—on the transaction of November 12th—— A. November 12th, yes.

Q. He paid \$12,750.00?

A. Yes, that's right.

Q. And on November 11th, \$11,323.12?

A. Yes.

Q. And on October 29th, \$8,910.00?

A. What was it—the eight thousand and how much? Was it the sale of the 3rd Alabama?

Q. The 3rd Alabama car.

A. The 3rd Alabama car, yes, \$8,910.00.

Q. Now, referring to the transaction of November 15th, was there any commission paid on that sale? A. Yes.

Q. How much of a commission was paid?

A. We received \$12,170.00—\$12,175.50, and we paid a dollar commission.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Q. To whom was that paid?

A. Henry Behr.

Q. Referring to the bill attached to that group of papers in connection with that sale, the purchaser paid \$12,782.81 in the payment of that bill, is that correct?

A. Must be some mistake here. Is that the same car? November 15th?

Q. The difference between the statement and the bill is that there is some freight added to the bill.

A. Yes. We paid for the freight, is that it? We paid for the freight.

Q. I am referring to your bill there. Your bills says "added prepaid freight," which makes the total I just gave you of \$12,782.81; and I am asking: Did the purchaser pay that amount in payment of this bill?

A. Well, those two figures match on that. Where is the figure here? Let's see now. Where are those figures? November 15th. Well, one statement says \$12,782.00, including the freight, so the difference in here—it says \$12,197.00. I wouldn't know. I wouldn't know why the difference. Anybody know the difference here?

Q. You don't know why the difference?

A. No, no, no.

Q. Do you know how much you collected from the purchaser in that case?

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

A. Well, I will have to refer to the books. Maybe this is it and maybe this is it. I don't know.

Q. Have you the books with you that you can refer to as to that?

A. No, sir, no, sir. I don't see why there is a——

Mr. Breslauer: Have you the books, Mr. Brownstone, which show how much was paid?

Mr. Naus: Mr. Breslauer, I think that is utterly immaterial. The question is what price the sales were made. Now, whether they were successful in collecting cash or not—we haven't the books here, and don't propose to go after them.

Mr. Brownstone: I might add to that that the bill attached to these documents states that the price is \$8.50; the total received was \$12,197.50, which corresponds exactly with Exhibit "A"; and the difference is added prepaid freight, \$585.31.

Mr. Naus: My understanding of these documents just from looking at them is that there is a price—how much is it—\$8.50—there was a price of \$8.50 a case f.o.b. San Francisco. For some reason of business convenience or otherwise, the freight was prepaid.

Mr. Brownstone: That is it.

Mr. Naus: So apparently the shipper prepaid the freight, and the goods were sold f.o.b. San Francisco. That is all there is to it.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Mr. Breslauer: And we are asking whether you have any books to show how much the purchaser paid on that transaction that I have just referred to.

Mr. Naus: I haven't the slightest doubt in the world that there are books showing what cash was received from this or any other purchaser.

Mr. Breslauer: I am asking whether you have them here in answer to the subpoena duces tecum.

Mr. Naus: They are not here. I don't understand that the subpoena duces tecum calls for cash receipts.

Mr. Olshausen: I believe the subpoena calls for the names of the purchasers and the amounts received from them.

Mr. Naus: I have a copy of the subpoena if you want to look at it.

Mr. Olshausen: Yes. The person to whom, price at which and the quantities of such wine sold.

Mr. Naus: Yes, the price at which. We told you that. We were not asked to bring up any bank books or deposit slips or cash books or anything of the sort; and I think it would be a waste of time if the subpoena called for us to bring them; but, anyway, it does not call for it.

Mr. Breslauer: Q. Referring to the transaction on November 19th, was any commission paid on that? A. No.

Q. With reference to the transaction of November 19th and all previous transactions, do you know,

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Mr. Bercut, whether the purchasers paid any commission to any third person?

Mr. Naus: You mean all previous transactions?

Mr. Breslauer: That he has testified to since the last trial. A. If he did what?

Mr. Breslauer: Q. Do you know if the purchaser paid any commission?

A. No, not to my knowledge.

Q. Not to your knowledge. Referring now to the transaction of November 22nd—

Mr. Naus: There are two transactions on that day.

Mr. Breslauer: Q. The Clackamas Grocery Company, 2nd Oregon car. I ask you if there was any commission paid? A. Yes.

Q. How much a commission, and to whom was it paid?

A. To the name I previously mentioned. What is his name? Morasky. Morasky.

Q. And how much of a commission was paid?

A. Twenty-five cents.

Q. Twenty-five cents a case? A. A case.

Q. Is that correct? A. Yes.

Q. Refer to the transaction of February 24th, 1944, Grape Empire Wine Company, Oakland, and referring particularly to the wines referred to in the contract in this case: Will you tell me how much the purchaser paid the P. & J. Cellars for those wines?

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

A. The Grape Empire Wine Company of Oakland?

Q. Yes, that is correct? A. 185 cases.

Q. That is correct.

A. They paid \$8.25 a case.

Q. Was there any commission paid on that?

A. No, no commission to anybody.

Q. Referring to the transaction of February 26th, 1944, Buxton-Smith Company, Arizona—

A. Yes.

Q. (Continuing) —was there any commission paid on that transaction?

A. Twenty-five cents.

Q. And to whom was that commission paid?

A. Morasky.

Q. That is twenty-five cents per case?

A. Yes.

Q. Referring back to the transaction of February 10th with Scandia Commercial Company—

A. February 10th.

Q. (Continuing) —and particularly to the wine covered in this contract. I will ask you if there was any commission paid on that sale to the Scandia Commercial Company?

A. The payment of a premium—

Q. Ten cases of burgandy.

Mr. Naus: The footnote shows ten cases of burgandy at \$8.50 a case.

A. No, no commission paid.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Mr. Breslauer: Q. I don't seem to identify that one. Can you do that for me, Mr. Bercut?

A. Universal Wines. Is there any bill of lading there?

Q. I have gone over every one, Mr. Bercut, and I have identified them. This is one that I haven't.

Mr. Naus: I can't say from my own knowledge, Mr. Breslauer, what that is. I can only make a guess, and you are not at all bound by it; but in looking it over, my guess is that it simply is an office memorandum forming the basis of a credit memorandum in the 5th Alabama car deal. You will observe that 5th Alabama car deal is carried into the total column, the last one on the right of Plaintiff's Exhibit "A" for identification as \$10,677.15, which is the final amount for which the customer was to have been billed under that shipment. This paper in my hand indicates to me that before this shipment, the purchaser had put up a certified check No. 8515 for \$10,951.87, thereby, as the events turned out, overpaying for the car, and this is a credit memorandum showing a balance of \$274.72 cash that goes back to the buyer. Now, that is only a guess on my part. I have never seen it before. Your guess is as good as mine; but that has all the earmarks to me of a credit memorandum that for office convenience, and not having any printed forms, they used for the office file an invoice form.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

Mr. Breslauer: Q. Since the last trial, Mr. Bercut, you are still a partner of P. & J. Cellars?

A. Yes.

Q. And there are no other partners besides you and Mr. Peter Bercut? A. No.

Mr. Breslauer: That is all.

State of California,

Northern District of California,

City and County of San Francisco—ss.

I hereby certify that on the 10th day of March, 1944, at 11:00 o'clock A. M., before me, Thomas A. Dougherty, a Notary Public in and for the City and County of San Francisco, State of California, at Room 715 Chancery Building, 564 Market Street, San Francisco, California, personally appeared pursuant to Order Granting Motion to Take Second Deposition of Defendants and Fixing Limitations, Pierre Bercut and Jean Bercut, witnesses called on behalf of the plaintiff herein, and George Olshausen, Esquire, Alfred F. Breslauer, Esquire, and Mrs. Thelma S. Herzig appeared as attorneys for the plaintiff; and Louis H. Brownstone, Esquire, and George M. Naus, Esquire, appeared as attorneys for the defendants Pierre Bercut and Jean Bercut, individually and as copartners doing business as P. & J. Cellars, a copartnership; and the said Pierre Bercut and Jean Bercut being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by the depositions hereto annexed.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

And I further certify that the said depositions were then and there recorded stenographically by Harold H. Hart, a competent official and disinterested shorthand reporter, appointed by me for that purpose and acting under my direction and personal supervision, and was transcribed by him.

And I further certify that at the conclusion of the taking of said depositions, and when the testimony of said witnesses was fully transcribed, said depositions were submitted to and read by said witnesses and thereupon signed by them in my presence, and that the depositions are a true record of the testimony given by the said witnesses.

And I further certify that the said depositions have been retained by me for the purpose of securely sealing them in an envelope and directing the same to the Clerk of the Court as required by law.

And I further certify that the exhibit hereto attached and marked "Plaintiff's Exhibit A for identification," is the exhibit referred to and used in connection with the depositions of said witnesses.

And I further certify that I am not of counsel or attorney to either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

(Testimony of Jean Bercut.)

(Plaintiff's Exhibit 13-B—Continued)

In Witness Whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this day of, A. D. 1944.

Notary Public in and for the City and
County of San Francisco, State of
California

Mr. Bourquin: And I take it, your Honor, as the offer has been reinforced, it is understood it has been objected to by Mr. Naus and your Honor has sustained the objection?

Mr. Naub: I would not say "reinforced"; I would say "expanded."

Mr. Bourquin: "Expanded," then. That may be understood, counsel?

Mr. Naus: Yes.

Mr. Bourquin: That is all, your Honor.

The Court: That is all.

Mr. Bourquin: We will ask to recall Mr. Elman, if your Honor please.

The Court: Yes.

PHILIP ELMAN,

recalled; previously sworn.

Direct Examination

Mr. Bourquin: Q. Mr. Elman, prior to the date of April 27, [253] 1943 had your concern, Park, Benziger, sold or made any commitments for the sale of any of these wines?

A. We did make a commitment.

Mr. Naus: One minute. That can be answered Yes or No, if the Court please.

The Court: Overruled. You may proceed.

Q. You did make a commitment?

A. We did make a commitment for the sale of that wine to one of our wholesalers.

Mr. Bourquin: Q. Without telling us what it was, when you say you made a commitment, what was the nature of your commitment?

A. Took an order for it.

Q. Took an order, accepted an order?

A. Yes.

Q. For how much and what type of wine?

A. 1,200 cases of the P. & B. California wines, which we had purchased from the Bercuts.

Q. Dry or sweet? A. They were mixed.

Q. Mixed. Have you a record of the relative types involved, dry and sweet?

A. They were to be comprised of the dry wines that were stipulated in the contract and the sweet wines in the ratio——

Mr. Naus: If the Court please, he was only asked if he had a record. I would like to object to it as

(Testimony of Philip Elman.)

apparently calling for secondary evidence of the writing. And I might add that I think it was on the 4th of this month, perhaps the better part of a couple of weeks ago, I gave a notice to produce on the other side to bring in any records they had, orders, contracts and the like. Now, the question is put and the way the answer is started, the witness may be talking about an order orally accepted or it may be an attempt to state from memory something which a writing speaks about better. [254]

The Court: Are you moving to strike out the evidence?

Mr. Naus: I will object to the question as being ambiguous in the sense that the question does not disclose whether it is calling for an oral quotation or the oral acceptance of an order, or whether it is calling for secondary evidence of a writing.

The Court: Read the question.

(Question read.)

The Court: Overruled.

A. No, we have no record of the relative types of dry and sweet.

Mr. Bourquin: Q. Can you tell us on that order how much of the order related to dry wines and how much related to sweet wines?

Mr. Naus: I object to that as calling for secondary evidence.

Mr. Bourquin: He says no.

Mr. Naus: Please. I object to that as calling for secondary evidence of a writing, and I ask at this

(Testimony of Philip Elman.)

time that any record they have of the order be produced.

The Court: Q. You said you had no record of it?

A. No, sir.

The Court: He has no record of it. Overruled.

Mr. Naus: May I examine him for a moment or two on voir dire in connection with it, then?

The Court: No, no, not at this time.

Mr. Bourquin: Q. Mr. Elman, was there a demand for the types of wine specified in the contract Plaintiff's Exhibit 2 in New York or in the territory with which you were concerned, dealt and sold in the month of April 1943?

A. We had to lock the doors, it was that bad.

[255]

The Court: No, no. The answer may go out. Answer the question as directly as you can. Read the question, Mr. Reporter.

(Question read.)

A. Yes, there was a considerable demand for those wines.

Mr. Bourquin: Q. Wholesale or retail?

A. Both.

Q. Did your concern at that time operate on both a wholesale and a retail basis?

A. We did, sir.

Q. In what quantity did such demands exist in your retail operations?

A. An immense quantity.

(Testimony of Philip Elman.)

Q. How much would you have sold if you had gotten the wine? A. All of that.

Q. Do you know the operating charges of your concern for the handling of a commodity of the type and source, the San Francisco source, such as is specified in the agreement Plaintiff's Exhibit 2 in April of 1943.

Mr. Naus: One moment. Objected to upon the ground that no proper foundation has been laid to put such a question to this witness. Specifically, it does not appear that this witness runs the business; it does not appear that this witness supervises the accounting records; it does not appear that this witness keeps the accounting records.

Mr. Bourquin: Maybe I can add something to that, your Honor.

The Court: If you wish.

Mr. Bourquin: Please.

Q. Mr. Elman, you told us the other day that you as vice president were charged with the sales and promotion of the product of Park, Benziger & Company; is that correct?

A. That is correct, sir.

Q. As such did you or not have to do with the costs and charges [256] that your company incurred in the sales and promotion of those products?

A. Yes, definitely.

Q. Do you know what the costs and charges to your company were and ran in April 1943 for the marketing at retail of commodities of the type and quantity specified in Plaintiff's Exhibit 2 here?

A. Yes.

(Testimony of Philip Elman.)

Mr. Naus: Objected to upon the grounds heretofore stated and upon the further ground that through this very witness it has heretofore appeared in this case that the plaintiff, Park, Benziger & Company, were entering into something entirely new as to which they had no experience with respect to costs of handling and the like, and it is an attempt to lay a foundation of the speculative possibilities of what costs they might be put to in promoting, handling and labeling a new line of California wines they never had before and to compare that with other products as whisky, packaged goods, and the like.

Mr. Bourquin: Isn't that a matter of cross examination, your Honor?

Mr. Naus: I don't think so. I made my objection.

The Court: Q. How long did you say you have been with the Park, Benziger Company?

A. Since 1939, your Honor.

Q. I think you said that the business consisted of imported wines and whiskies? A. Yes.

Q. Did you have anything to do with labeling and marketing these imported wines?

A. Yes, your Honor. I was actively engaged in the sales and promotion of all the merchandise of Park, Benziger.

Q. And you had been since 1939?

A. 1939, yes.

The Court: The objection is overruled.

The Witness: The answer was "Yes." [257]

(Testimony of Philip Elman.)

Mr. Bourquin: Q. Mr. Elman, what did the charges and costs for the marketing of the commodities such as specified in Plaintiff's Exhibit 2 run your concern in April of 1943?

The Court: Do what?

Mr. Bourquin: Run—when I say “run” their concern, I mean what did they amount to for the marketing of such a commodity.

The Court: Cost what? To market what?

Mr. Bourquin: To market a commodity such as that specified here in Plaintiff's Exhibit 2, your Honor.

The Court: Make it more specific.

Mr. Bourquin: I will.

Q. Let me ask you, What did the costs and charges of your company run in April 1943 for the handling and sale of wines of the types specified here in the contract?

Mr. Naus: One moment. Objected to upon all the grounds heretofore stated, and upon the further ground that from the evidence it appears that they had no previous experience in handling such wines.

The Court: They had previous experience in handling wines, imported wines. It is true that conditions were such that they felt the need of dealing in domestic wines, and they turned to California for the purpose of getting domestic wines.

The Witness: That is right, your Honor.

The Court: Q. That is correct, is it not?

A. Yes, your Honor.

(Testimony of Philip Elman.)

Q. Having in mind the experience you have had with marketing and promotion of wines and applying that to these domestic wines, as I understand it, you are answering these questions now; is that not true? A. Yes. [258]

The Court: What was that last question of yours?

Mr. Bourquin: Q. What would you say——

The Court: You would have to make that more specific: 20,000 cases or 60,000 cases or whatever you have in mind.

Mr. Bourquin: Thank you, your Honor.

Q. Mr. Elman, what would the costs and charges for the handling and promotion and sales of wines——

The Court: Such as that described in the contract Exhibit 2——

Mr. Bourquin: Q. (continuing) ——run you per case, per carload or per thousand cases in April 1943?

Mr. Naus: That is all subject to the same objection.

The Court: Overruled.

A. About six per cent of the price, the selling price, your Honor.

Mr. Bourquin: Q. Six per cent of the selling price?

The Court: Q. Whether it was 1,000 cases, 5,000 cases or 30,000 cases?

A. It was based on the total volume of business we do per year, your Honor.

Mr. Bourquin: Q. It would run constantly irre-

(Testimony of Philip Elman.)

spective, as the Court has asked you, of the number of cases involved? A. That is right.

Q. Did you have a price established if you sold wines of this type for your acceptance in April—when I say “wines for your acceptance of this type”—in April 1943? A. We did.

Q. How was the price established?

A. We established that price according to the OPA methods then in existence and published same in the State of New York.

Q. Did that deal with different types of dry and sweet?

A. Yes, it did, with the identical types mentioned in the [259] contract.

The Court: Q. The identical types of wines mentioned in the contract, is that right?

A. Yes.

Mr. Bourquin: Q. You say you had and did post and publish the prices for the identical types of wines? A. Yes.

Q. What were those prices?

A. As I recall it——

Mr. Naus: Objected to——

The Court: One moment.

Mr. Naus: The witness has testified he posted and published prices. I now object to the last question on all the previous grounds and on the additional ground they are now calling for secondary evidence of a writing.

The Court: How about the prices? Have you got a list?

(Testimony of Philip Elman.)

The Witness: There was a list, your Honor.

Mr. Bourquin: Mr. Naus, I am going to call his attention and ask to put in matter from an exhibit used in the earlier trial marked Plaintiff's Exhibit 12. Do you have it in mind, or do you want to see it?

Mr. Naus: I do not know which one of the two or more exhibits this one is. This is only one of two. This is marked "Retail."

Mr. Bourquin: I am asking about retailers now.

Mr. Naus: Then you are amending your last question.

Mr. Bourquin: Well, I have to that extent.

Q. You understand we are talking about retail now, do you not? A. Yes.

Q. And we have been on this latter examination, is that correct? A. Yes.

Q. Can you identify this as the schedule that you posted for the prices published for those wines?

A. Yes, this is the price [260] list.

Q. It was published or posted when?

A. It was posted in the month of March for sale in April.

Q. For the month of April 1943, is that correct?

A. Yes, sir. They were posted in March for the month of April, sir.

Mr. Bourquin: We will offer it in evidence, if your Honor please, and ask that it be marked Plaintiff's exhibit next in evidence.

Mr. Naus: Objected to first as outside the issues; secondly, upon the ground that the evidence is in-

(Testimony of Philip Elman.)

sufficient to show and establish business in California wines of this type; third, on the ground there is no foundation to show any basis for any attempted effect of a calculation of supposed loss of supposed profits on that. There is no proof whatever—in fact, the proof is to the contrary—and no proof whatever that at the time of the contract, January 29, 1943, the defendants were put on notice or warning that if thereafter there was a breach, that loss of profits would be a consequence because of the unavailability of other wines in the market.

The Court: Overruled. Does that mention California wines?

Mr. Bourquin: Yes, your Honor, it does. Do you care to see it?

The Court: No, I don't care to see it. Do you wish to call attention to that?

Mr. Bourquin: Yes, your Honor.

The Court: Very well.

(The document was marked "Plaintiff's Exhibit 14.")

(Testimony of Philip Elman.)

PLAINTIFF'S EXHIBIT 14
SCHEDULE OF WINE PRICES
TO RETAILERS

Effective for the Month of March 1943

The undersigned licensee files the following schedule of prices to retailers pursuant to Section 101-B of the Alcoholic Beverage Control Law.

PARK, BENZIGER & CO., INC.

Signed by JACK BENZIGER

President

24 State St.

New York, N. Y.

License Number LL-281

This schedule is subject to such rules as the State Liquor Authority has or may hereafter adopt.

Discount for Time of Payment: 1% 10 Days.

Prices include delivery in N. Y., Bronx and Kings Counties. In other Counties, prices are on an f.o.b. New York County basis.

Deliveries will not be made on orders of less than one case.

All mdse. offered is subject to prior sale, war condition restrictions, strikes, labor difficulties, delays in transit, inability to obtain or deliver mdse. and conditions beyond our control.

All March prices on our schedule are subject to the new Federal Taxes effective Nov. 1, 1942.

(Testimony of Philip Elman.)

No cash or quantity discount is allowed on these new taxes.

We reserve the right to limit sale and deliveries in accordance with customers' previous experience and needs. Should we be unable for any reason to complete an order in full, any instalment or proportion thereof that we are able to deliver, if accepted by the buyer, shall be regarded as delivery of the order.

This Schedule of Wine Prices to Retailers for
April

Month of ~~March~~ 1943 Consists of 1 Pages.

(Testimony of Philip Elman.)

SCHEDULE OF WINE PRICES TO RETAILERS

Type of Beverage and Brand Name	Size	Age	Price		No. of Btls. Per Case	Discount For Quantity
			Alcoholic Content	Per Bottle		
Sparkling Wines—Domestic						
“Pere Manon” Amer. Champagne.....	26 oz		13%	19.95	12	5%—5 cs
	13 oz		“	21.95	24	“
“Grand Bouquet” Amer. Champagne.....	26 oz		“	19.95	12	“
	13 oz		“	21.95	24	“
“Pere Manon” N. Y. State Champagne.....	26 oz		“	20.95	12	“
	13 oz		“	22.95	24	“
“Sondria” N. Y. State Champagne.....	26 oz		“	20.80	12	“
	13 oz		“	22.80	24	“
Sparkling Burgundy—Domestic						
“Pere Manon” Amer. Spark. Burgundy.....	26 oz		“	19.95	12	“
	13 oz		“	21.95	24	“
“Grand Bouquet” Amer. Spark. Burgundy.....	26 oz		“	19.95	12	“
	13 oz		“	21.95	24	“
“Pere Manon” N. Y. State Spark. Burgundy.....	26 oz		“	20.95	12	“
	13 oz		“	22.95	24	“
“Sondria” Spark. Burgundy.....	26 oz		“	20.80	12	“
	13 oz		“	22.80	24	“
Wines, Still, Domestic—New York State						
“H.V.D. (Hudson Valley District) Dry Wines						
only—Sauterne, Rhine, Claret, Burgundy.....	5ths		19%	6.96	12	“
“Bolognesi” (New York State) Haut Sauterne,						
Rhine, Chablis, Claret, Burgundy.....	5ths		13%	8.50	12	“
	10ths		“	10.00	24	“

(Testimony of Philip Elman.)

Type of Beverage and Brand Name	Size	Age	Alcohol Content	Per Bottle	Per Case	Per Case	For Quantity
Vermouths—Domestic							
“DuBouchett”—dry	30 oz		18%		10.24	12	5%—5 cs
“Vernat” Sweet	30 oz		16½%		8.30	12	“
“ Dry	32 oz		18%		8.55	12	“
“ Extra Dry	32 oz		18%		9.30	12	“
“ Sweet	1½-gals		16½%		8.30	6	“
“ Dry	1½-gals		18%		8.30	6	“
“ Sweet	gals		16½%		9.25	4	“
“ Dry	gals		18%		9.25	4	“
“ Double V—sweet	4/5 qt		16½%		9.00	12	“
“ extra dry			18%		9.60		5%—5 cs
“ dry	4/5 qt		18%		9.00	12	“
Wines, Still, Domestic—California							
“Cresta d’oro” Lt. Wine Chianti type	30 oz		12%		10.22	12	“
	15 oz		“		11.22	24	“
California “P & B” Brand, dry							
Sauterne, Rhine, Claret, Burgundy	4/5 qt		“		10.51	12	“
California “P & B” Brand Port & Sherry	4/5 qt		20%		10.96	12	“
“Golden Vista” Calif. Sherry, Port, Muscatel,							
Tokay	gals		20%		7.40	4	net
	1½-gals		“		6.10	6	“
	qts		“		6.10	12	“
	4/5 qt		“		5.65	12	“
	qts		“		7.10	12	“
“Rosalinda” Calif. Sherry							

PARK, BENZIGER & CO., INC.

24 State St., New York, N. Y.

April

Schedule of Wine Prices to Retailers effective month of ~~March~~ 1943

(Testimony of Philip Elman.)

The Court: How is that designated?

Mr. Bourquin: It is designated "Schedule of Wine Prices [261] to Retailers." At the top it is stated "Effective for the Month of March 1943," but at the bottom, at the execution it says, "This schedule of wine prices to retailers for month of April 1943 consists of one page." And there follows one page of the schedule of prices.

Q. Mr. Elman, was this filed under the authority of the New York Liquor Authority?

A. It was.

Q. Filed with that Authority? A. Yes.

Q. And then posted to your retail trade, published to your retail trade? A. Yes.

Q. Without going through the whole thing, it showing other commodities, it does show that you filed and posted prices upon California P. & B. Brand dry Sauterne, Rhine, Claret, and Burgundy, P. & B. referring to the P. & B. Cellars product—

The Court: P. & B. what?

Mr. Bourquin: P. & B. referring to the Cellars as we have known them here, P. & B. being the Bercut Brothers' product; is that correct?

The Court: Well, look at it.

The Witness: That P. & B. was Park—do you mean P. & B. Brand?

Mr. Bourquin: Q. P. & B. Brand.

A. Park, Benziger.

Q. Oh, Park, Benziger?

A. Park, Benziger.

(Testimony of Philip Elman.)

Q. I beg your pardon. In other words, this "California P. & B." refers to the Park, Benziger brand? A. That is right.

Q. Dry Sauterne, Rhine, Claret, Burgundy, in $\frac{4}{5}$ of a quart.

Mr. Naus: Fifths of a gallon.

Mr. Bourquin: I am reading $\frac{4}{5}$ of a quart. It is on here.

Mr. Naus: Pardon me. [262]

Mr. Bourquin: Cases of 12 packages at \$10.51 a case.

Q. Is that correct? A. That is correct.

Q. Below it, prices filed for California P. & B. brand Port and Sherry, also $\frac{4}{5}$ quarts, showing the alcohol content at 20 per cent, at \$10.96 per case of 12 bottles; is that correct?

A. That is right.

Q. Let me ask you one further question: In this transaction your company undertook to pay the freight—in other words, you undertook to take this f.o.b. San Francisco, didn't you?

A. Yes, sir.

Q. Did the charges that you have given us, six per cent of the selling price, not include your transportation charges to New York?

A. No, they did not include the transportation charges.

Q. Do you know what the transportation charges on liquor carloads—what charges prevailed for the shipment of such from San Francisco to Park, Benziger in New York in April of 1943?

(Testimony of Philip Elman.)

A. Approximately 35 cents a case.

Q. Approximately 35 cents a case.

A. Freight and insurance.

Q. What? A. Freight and insurance.

Q. Were there any other charges accruing to you in the operation of your business in the handling of wines of this type at that time in New York, April 1943, other than I have mentioned, namely, the six per cent operating charge, and you mention the transportation and insurance?

A. None, sir.

The Court: Mr. Bourquin, Mr. Naus called your attention to the fact that there was another schedule, I think.

Mr. Bourquin: There is a wholesale list that was used at the other trial. There was a wholesale list, your Honor, but before I approach that I want to ask the witness a question.

Q. As you know, the condition of the market in New York in [263] April 1943, could you have marketed the whole 27,000 cases, the first lot mentioned in this contract, at retail?

A. Definitely, sir.

Q. On the basis that you have already outlined to us today of charges? A. Yes, sir.

Q. For the consideration—if I don't put it in—

The Court: Excuse me. I thought you were overlooking something.

Mr. Bourquin: I appreciate that, your Honor.

The Court: I know Mr. Naus called attention to it.

(Testimony of Philip Elman.)

Mr. Bourquin: I think perhaps if I were on the jury, I would like to know it anyway. I would like to offer it.

Mr. Naus: Reluctantly or not, why don't you put it in?—over my objection.

The Court: Are you objecting, Mr. Naus?

Mr. Naus: Simply the general objections heretofore made.

The Court: Overruled.

Mr. Naus: But in that I am simply bowing to the rulings thus far made.

The Court: It hasn't anything to do with this case.

Mr. Bourquin: Yes, it has, your Honor. It contains the wholesale prices posted, if I may put it in evidence——

The Court: Why don't you tell the jury what it is?

Mr. Bourquin: I will call attention to the prices filed and posted for wholesale by Park, Benziger Company of California P. & B. Brand, Dry Sauterne, Rhine, Claret, Burgundy wine, 4/5 quarts, alcohol 12 per cent, case of 12 bottles, at \$6.75 a case; and on sweet wines California P. & B. Brand, Port and Sherry, same package, 20 per cent alcohol content, case of 12 bottles, \$7.50 per case. [264]

The Court: Are you offering that?

Mr. Bourquin: Yes, we do, your Honor.

(The document was marked "Plaintiff's Exhibit 15.")

(Testimony of Philip Elman.)

PLAINTIFF'S EXHIBIT 15

SCHEDULE OF PRICES TO WHOLESALERS

Effective for the Month of May 1943

The undersigned licensee files the following schedule of prices to wholesalers pursuant to Section 101-B of the Alcoholic Beverage Control Law.

PARK, BENZIGER & CO., INC.

Signed by JACK BENZIGER

President

24 State St.

New York, N. Y.

License Number LL-281

This schedule is subject to such rules as the State Liquor Authority has or may hereafter adopt.

DISCOUNT FOR TIME OF PAYMENT

— price is f.o.b. Chicago, Ill.

!	"	"	"	foreign port, British Isles.
*	"	"	"	Customs Bond, New York City.
#	"	"	"	Whse., New York City.
&	"	"	"	San Juan, Puerto Rico.
%	"	"	"	Winery, New York City.
"	"	"	"	New York City.
(	"	"	"	San Francisco, Calif.
/	"	"	"	Dinuba, Calif.

All quotations with the exception of the following symbols:

! f.o.b. foreign port, British Isles.

* " Customs Bond, New York City

include all Federal Taxes with the exception of the new Federal taxes effective Nov. 1, 1942. Same will be added to the price listed.

(Testimony of Philip Elman.)

All quotations are subject to N. Y. State Tax.

Wholesalers

Address

Asche Bandor Corp.	99 Hudson St., New York, N. Y.
Baxter Importers, Ltd.	585-6th Ave., New York, N. Y.
Capitol Dists. Corp.	345 Hudson St., New York, N. Y.
Capitol Dists. Corp.	68 W. Post Rd., White Plains, N. Y.
Eber. Bros. W. & L. Corp.	52 Public Market, Rochester, N. Y.
Eber. Bros. W. & L. Corp.	251 Bway, Buffalo, N. Y.
Elmira Tobacco Co., Inc.	325 Carroll St., Elmira, N. Y.
Graves & Rodgers, Inc.	382 Bway, Albany, N. Y.
Monarch Liq. Corp.	1213 E. Erie Blvd., Syracuse, N. Y.
Rochester Liq. Corp.	175 No. Water St., Rochester, N. Y.
Rodgers Liq. Co., Inc.	372 Bway, Albany, N. Y.
St. James Wines, Inc.	535-5th Ave., New York, N. Y.

Distribution of "Ron Libra" Puerto Rican Rum is restricted to:

Asche Bandor Corp.
99 Hudson St.,
New York, N. Y.

The following firm is restricted to the purchase of "H.V.D." (Hudson Valley District) and "Bolognesi" (New York State) Wines.

High-Life Products, Inc.
145 West 18th St.,
New York, N. Y.

Items, Prices and Quantity Discounts Contained in the April, 1943, Schedule Remain in Effect for This Month Except for the Changes Indicated on the Attached Schedule.

This Schedule of Prices to Wholesalers for Month of May 1943 Consists of 1 Pages.

(Testimony of Philip Elman.)

Type of Beverage and Brand Name	Page on Master Schedule	Size	Age or % Neutral Spirits	Proof or Alcoholic Content	Price			No. of Btls. Per Case	Discount For Quantity
					Per Bottle	Per Case	Per Case		
Price Changes									
Page on Master Schedule									
"Marquis de Caussade" A.D.C. Imported Brandy	Pg 1	1 1/2 pts	20 yrs	84		36.25*		48	net
"Caray"—"Ron Suray"—"Ron Miron"—"Ron Libra" Puerto Rican Rums	Pg 1	5ths		85		17.85&		12	net
		10ths		"		18.30&		24	"
		pts		"		22.50&		24	"
		1 1/2 pts		"		12.50&		24	"
"Sondria" Champagne—Domestic		26 oz		13%		15.76"		12	"
New York State	Pg 2	13 oz		"		17.36"		24	"
"Sondria" Spark. Burgundy		26 oz		"		15.76"		12	"
New York State	Pg 2	13 oz		"		17.36"		24	"
"H.V.D." (Hudson Valley Dist.) Dry Wines only		5ths		13%		5.43"		12	"
—Sauterne, Rhine, Claret, Burgundy	Pg 3	10ths		"		6.63"		24	"
"Bolognesi" (New York State) Haut Sauterne, Rhine, Chablis, Burgundy, Claret	Pg 3	5ths		"		6.66"		12	"
"Vernat" Sweet Domestic Vernouth	Pg 2	10ths		"		7.86"		24	"
		32 oz		16 1/2%		6.45%		12	"
New Items									
California "P & B" brandy, dry, Sauterne, Rhine, Claret, Burgundy Wine		4/5 qt		12%		6.75(		12	"
California "P & B" brand, Port & Sherry		4/5 qt		20%		7.50(		12	"
Discontinued Items									
"Vernat" Sweet		1 1/2 gals		16 1/2%					
" Dry		1 1/2 gals		18%					
" Sweet		gals		16 1/2%					
" Dry		gals		18%					

(Testimony of Philip Elman.)

Mr. Bourquin: Q. Mr. Elman, can you outline for use the cost that would accrue and did accrue to your company in April 1943 for the handling and marketing of such wines at wholesale?

Mr. Naus: I presume I need not repeat my objection, although I renew it at this time. It is clear enough.

The Court: Overruled.

The Witness: You want the outline of the costs of that, as I understand?

Mr. Bourquin: Q. Please.

A. This merchandise is posted at these prices f.o.b. San Francisco. Therefore, there wouldn't be any question of freight entering into those particular prices. They were sold f.o.b. here.

Q. And insurance?

A. Freight and insurance. There would be no handling on our end of it there, other than a rebilling process for wholesale sale, since it was sold to the buyer here in San Francisco. The only work that we would possibly do would be the rebilling of the merchandise to the people we sold it to. We figured the overhead on that at two per cent, sir.

Q. At two per cent?

A. Of the sale price.

Q. So in the wholesale you are charged with two per cent, and in the retail six per cent plus 35 cents a case——

A. Transportation and insurance.

Q. Transportation and insurance?

(Testimony of Philip Elman.)

A. That is right, sir.

Mr. Bourquin: One further question.

Q. To your knowledge did Park, Benziger have a demand in New York in April 1943, at retail or wholesale or both, for the whole [265] 60,000 cases of the types of wines specified in the contract?

A. Oh, yes.

Q. Which way?

A. Both ways, retail and wholesale.

Q. Would either have consumed it?

A. Definitely.

Mr. Bourquin: You may cross examine.

Cross Examination

Mr. Naus: Q. I understood you to answer Mr. Bourquin that you stated to him all your expenses for selling this wine; is that correct—six per cent of your gross sales on retail and two per cent of your gross sales on wholesale, freight and insurance, and this and that? Would you speak out so the reporter can hear you? A. Yes.

Q. Have you included any expense for a salesman? A. No, we have not.

Q. Why not?

A. General overhead of the business included it at six per cent. We take those figures to sell the merchandise.

Q. You mean to suggest, do you, that if you paid Hermann fifty per cent, that that would be embraced in your two per cent in one case or your six per cent in the other?

(Testimony of Philip Elman.)

A. That is right.

Q. Do you mean to say that after paying Hermann fifty per cent of the net profits, your cost of doing business in one instance would be only two per cent of your gross sales?

Mr. Bourquin: We object to that, your Honor, as not proper cross examination, as I understand it.

Mr. Naus: If it isn't what is it?

Mr. Bourquin: The test here would be what was the net result to these people irrespective of what, you might say, appended as a charge under Mr. Elman's direction.

Mr. Naus: If the Court please, anyone who looks at the [266] complaint in this case will find that the only plaintiff in this case is Park, Benziger & Company. You won't find the names Hermann, Serge Hermann, Mrs. Serge Hermann, Mrs. Louise Hermann, or Chauteau Montelena of New York anywhere in the caption of the pleading. Here is the sole plaintiff.

Mr. Bourquin: He is entitled to prove—— Pardon me, your Honor.

The Court: What were you going to say?

Mr. Bourquin: I was going to say we were attempting to reduce this to a net profit. Their arrangement with Mr. Hermann was merely for a participation in the net profit.

The Court: Yes.

Mr. Bourquin: So I say that is a matter between the plaintiff and Mr. Hermann, with which the de-

(Testimony of Philip Elman.)

fendant has nothing to do, and it is irrelevant and immaterial.

The Court: It seems so to me.

Mr. Naus: That would depend, it seems to me, on what instructions your Honor finally gives to the jury, if we get to that point.

The Court: It may be so.

Mr. Naus: It might turn, if you instruct the way the defense has requested you, on whether the jury finds Mr. Hermann to be a partner or a joint venturer, on the one hand, or a mere employee on the other. It might be it will be for the jury to consider, if he was a partner or a joint venturer, the plaintiff was bound by his act in signing the cancellation of April 27, or, on the other hand, if they find he is merely an employee or a salesman on commission, then whatever they had to pay him was part of their expense of doing business, their selling expense. That is my theory. [267]

The Court: I understand what your theory is. I overlooked that point as to the joint venture. It might be I will instruct the jury as to that. I do not know at this time.

Mr. Naus: I will reframe the question and put another one.

Q. Now, Mr. Elman, this retail list, Exhibit No. 14, the wines that are involved here are in there under what heading?

A. P. & B. Brand, Mr. Naus, California P. & B. Brand. Right here, sir (indicating).

(Testimony of Philip Elman.)

Q. California P. & B. Brand, dry, Sauterne, Claret, Rhine and Burgundy; and then next Port and Sherry?

A. That is right.

Q. Those items?

A. Yes.

Q. You say that list was published for the month of March 1943, as I understand it?

A. No.

Q. I see it is typed "March" in there.

A. Yes, these were so set up, which should have been effective for the month of—and then down here—you see, the New York State law states that we have to publish these prices by the 10th of the preceding month. If we wanted to sell this wine in New York State in April, we would have to send in the price list by the preceding month, March 10, after which we could not submit a new price list to the State. Therefore, we listed the P. & B. Brand in the month of March with New York State before March 10 for sale in the month of April.

Q. That paper that you have in your hand, Plaintiff's Exhibit 14, just a word or two, when was that filed with the New York State Authority? I am asking now about a date.

A. Before March 10, sir. It had to be in before March 10.

Q. Was that effective for all time thereafter, or only for a particular month?

A. They were changed from month to month as the licensee saw it. [268]

Q. In that particular list there you are posting

(Testimony of Philip Elman.)

in February prices at which you will make sales in March and only in March, aren't you?

A. I beg your pardon?

Mr. Naus: May I have it read?

(Question read.)

A. That is rather ambiguous.

The Court: No.

A. Once we post a price it can continue on, if we continue to renew it. Monthly it is renewed. We can either delete it or continue it.

Mr. Naus: Q. What do you mean by renewing something in New York? Tell me what you do and how you mean.

A. It has to be sent to the Liquor Authority every month, the price list. We either delete items which are discontinued or we add new items to the list.

Q. You have to make up a new list on that kind of a form each month?

A. That is right, sir.

Q. In February you made up this list to be effective in the month of March and filed——

A. No, no. I am sorry. We made it up—we sent it in in March, and it is effective for April.

Q. I am looking at the top, the printing that is typed in there.

A. No, this means it was sent in in March and effective in April, which has been crossed out. That is one of the lists that were in the office. I am sorry.

(Testimony of Philip Elman.)

Q. Perhaps I misunderstood you. I understood you to say that it was published in April. Regardless of what is written on there, on what date was it that you filed it with the New York State Authority? A. On the 10th of March.

Q. To be effective for the month of April?

A. April. [269]

Q. Sometime in April you would have to file a new one to be effective in May, is that right?

A. Before the 10th of April, that is right, for the 10th of each month.

Q. Did you ever file one?

A. For the renewal of the——

Q. I will reframe it. Did you ever file one in April to be effective in the month of May?

A. Yes.

Q. A retail list?

A. It is available with the State Authority.

Q. Pardon me?

A. I say the copy is filed with the State Authority.

Q. When did you file that?

A. By April 10.

Q. Did you ever file one in May to be effective for the month of June?

A. No, we deleted it then.

Mr. Bourquin: Q. You mean on these items?

A. On those two items, that is right.

Mr. Naus: Q. Then, as I understand it, on the retail list you filed one in March to be effective in April—— A. Yes.

(Testimony of Philip Elman.)

Q. ———and then a month later you filed one in April to be effective in May? A. Yes.

Q. Are you sure of that now?

A. Just let me think a moment, sir. Yes, that is right.

Q. When in April did you file it?

A. Before the 10th, sir.

Q. Did you personally attend to the filing?

A. No, that is attended to by our girls in the office.

Q. Was that attended to before you left New York for San Francisco?

A. I should imagine it was.

Q. Let us not imagine. Was it?

A. I think so, yes.

Q. Let us not think about it. Do you know?

A. It was filed, sir.

Q. I see. Turning to Plaintiff's Exhibit 15, that is, a list for sales to wholesalers, is it not?

A. That is right. [270]

Q. That Plaintiff's Exhibit 15 you have in your hand was turned in to the New York State Authority on what date? A. May, sir.

Q. Pardon me? A. In the month of May.

Q. What date in May?

A. The 1st, I should say, or prior to the 1st it has to be in——

Q. No, let us not have a long speech about it. I am only asking you about one date. On what date was Plaintiff's Exhibit 15 or the original of it filed with the New York State Authority?

(Testimony of Philip Elman.)

A. The law requires it to be in before the——

Q. I am not asking you that, Mr. Elman, please.
On what date was it filed?

A. That I don't know, sir.

Q. A schedule of prices to wholesalers to be effective for the month of May would have had to be filed in April, wouldn't it?

A. That is right, sir.

Q. Well, if you do not know the date, can you tell me the month? Did you file it in April or did you file it in May?

A. It must have been filed in April.

Q. When in April was it filed?

A. Before the 1st of April.

Q. Before the 1st of April?

A. It must be in by the 1st. Therefore—I mean, they do not permit the new addition—I mean new list—the list has to be in to the State Authority by the 1st of the month for wholesale and by the 10th of the month for retail.

Q. Do you mean by the 1st of the month in which it is to be effective?

A. No, it always the following month.

Q. Are you telling me you filed it in April but on a date before the 1st of April? I don't know. I don't follow you. Perhaps I am dumb.

A. You aren't dumb; you are just trying to confuse me. The law is definite. It says—— [271]

Q. Take your time; think it over and tell me. You say you do not know when it was filed. Tell

(Testimony of Philip Elman.)

me when it had to be filed instead of telling me the 1st of the month—give me the name of the month. We keep getting the months mixed up.

A. What is your direct question on that? and I will try to answer it.

Q. You have in your hand a paper that we call Plaintiff's Exhibit 15. It is what is called a wholesaler's list. It says at the top it is to be effective for the month of May 1943. I am trying to find out when that was filed, the date it was filed with the New York State Authority. That is all I am trying to find out.

A. It must have been filed in April, sir.

Q. And about when in April?

A. From the 1st to the 3rd.

Q. 1st to the third. Within the first three days of April, do you mean? A. That is right.

Q. Did you or did you not have anything to do with the filing of that wholesaler's list before you left New York for San Francisco?

A. Yes, we established the price of wine and established the wholesale price on it.

Q. Now, that wholesaler's list has on it, as you observe, a list of the names of ten wholesalers with their street and city addresses given.

A. That is right.

Q. Were they customers of yours?

A. They were.

Q. In that list that you were publishing to be effective in the month of May were you offering

(Testimony of Philip Elman.)

these Bercut wines to that list of ten specifically named wholesalers, your customers?

A. No Bercut wines could be purchased by any wholesaler in the State of New York. This refers to certain types of merchandise which are on restricted lists. [272]

Q. Well, the Bercut wines were put on a wholesale list to be bought by any one of those ten customers of yours or by any other wholesaler in the market, weren't they? A. That is right.

Q. It is a public general offering to wholesalers?

A. That is right.

Q. Prior to April 27, 1943 had Park, Benziger & Company ever sold any of this Bercut wine to any retailer?

A. Yes, we have many retailers come into the office asking for wines, and we had showed them the samples which we had received from the Bercuts.

Q. Mr. Elman, I didn't ask you who called at your office. I said had you in fact actually sold any? Had you committed yourself to anybody?

A. Sure; we told them when they came in we expected to have these wines for sale and just as soon as they were available we would let them have them, and they asked us for them.

Q. A businessman generally knows what a commitment is. Did anybody give you an order for any?

A. We couldn't sell anything we did not have, in so far the delivery had not been made physically in New York.

(Testimony of Philip Elman.)

Q. That is argument.

A. It is no argument. I didn't mean it to be that way.

Q. As I understand it, you had not signed up an order committing you as a businessman upon any specific sale to any specific retailer, had you?

A. No.

Q. Pardon me?

A. I am sorry. You said written order, and I said no.

Q. Well, if you got it on the telephone you would write it down on a paper and treat it as an order?

A. I suppose so. [273]

Q. Did you do anything of the sort?

A. There were quite a number of people in the office. We showed them the list. They liked them, and we said as soon as we were ready to set them up, bring them in—and they said they would be glad to have them.

Q. Up to April 27, 1943 had you actually signed up any order to any wholesaler?

A. No; I got an oral order from one of our customers which we took—accepted, I mean, verbally.

Q. Some wholesaler in New York?

A. The Globe Distributing Company in Washington, D. C.

Q. A carload more or less?

A. About 1,200 cases.

Q. Nearly a carload?

A. Yes.

Q. It was at least a minimum carload, wasn't it?

A. Yes.

(Testimony of Philip Elman.)

Q. Had you sold any in New York City?

A. I made commitments to the people that came up to the office to this effect: that when the wines were available, physically available, in New York City that we would send them the wines that they wanted. They tested the wines without any labels on them, samples we had gotten from the Bercuts, and after testing the wines they liked them very much, and we said, "Just as soon as we are ready with them—we are working on the labels—just as soon as we have them physically available, we will let you know."

Q. Now, those prices in the wholesale list named there are prices f.o.b. San Francisco, the way you bought them? A. Yes.

Q. The prices in the retail list are prices f.o.b. New York? A. Yes.

Q. You would have to pay the freight in addition to the price paid to the Bercuts, is that correct? Would you speak up so the reporter can hear you.

A. Yes. I am sorry.

Q. This sale to the wholesaler at Washington, D. C., 12,00 cases—was that dry or sweet wine or both?

A. It was [274] supposed to be a division between sweet and dry.

Q. In what proportions?

A. In the proportion that we were going to receive it in the contract—about five to one. I guess, six to one.

(Testimony of Philip Elman.)

Q. In whatever percentage of sweet wines appear in the 26,691 cases in the Bercut contract, that distributor would get roughly the same percentage, wouldn't he? A. About the same.

Q. The sweet wines were a very small percentage of this deal? A. They were.

Q. For all practical purposes the dry wine was the deal, wasn't it? A. Yes, sir.

Q. Was your arrangement with this wholesaler in Washington, D. C. on an f.o.b. San Francisco basis? A. Yes.

Q. Did you make that arrangement with him before or after your posting or filing or publishing of Plaitniff's Exhibit 15, the wholesale list?

A. I don't recall, sir.

Q. Do you mean you may have sold it to him before you published a price at all? A. Yes.

Q. Was it to be a deal with him on the basis of such a price some time thereafter published or posted? A. That is right.

Q. Now, you were out here about in the middle of April, and for a few days after that, to complete arrangements for labeling, packaging and shipping the wine; you remember that?

A. I testified to it.

Q. Assuming that all the parties had gone ahead and you had furnished the labels and shipment had started at the time you contemplated when you arrived in San Francisco, when would the first car have left San Francisco?

(Testimony of Philip Elman.)

A. Within a few weeks after I arrived.

Q. Well, within what time after April 27 would the first carload [275] have left San Francisco?

A. Within two weeks, maybe three.

Q. The middle or the latter part of May?

A. That is right—about the first half.

Q. Reaching East about the early part of June?

A. About the end of the month, the end of May, the early part of June.

Q. And then the next car would be about the end of June or the first of July, that is, at the rate of a car a month, wouldn't it?

A. Yes.

Q. You now have it right?

A. Yes.

Q. And the third car would have reached the East about the 1st of August?

A. I suppose so.

Q. Correct?

A. I suppose so.

Q. Let us not suppose. You are the one who knows. I am asking to find out.

A. It never happened, so how would I know when it arrived?

Q. If it had happened I would look to the freight bill or the bill of lading and not have asked you.

A. It would depend on how much time it took the cars to get from San Francisco to New York. I have no knowledge of what didn't happen, when it didn't happen, any more specifically anyhow.

Q. Then it would have taken about three carloads to keep you to the 1st of August 1943, as I understand it?

A. I think so.

(Testimony of Philip Elman.)

Q. Having in mind that you tell us that you were in charge of the sales, posting of prices—you are familiar with that, an expert in that—perhaps I would not be presuming too much to assume that you know that in August 1943 the OPA put a ceiling on you; you know that, don't you?

A. In August? [276]

Q. Yes. A. A ceiling on us?

Q. In August 1943, yes.

A. There is a revision—there is a revision constantly on OPA ceilings. At that particular time I don't recall what the ceiling was. Do you have the OPA revision of that month?

Q. I have something that looks like it.' I will ask you whether or not in August 1943, beginning then and ever since—

Mr. Bourquin: Before you testify to that—

The Witness: If I have been qualified as an expert, maybe I will get a job.

Mr. Naus: No, I am not trying to qualify you as anything—as an expert in that respect. I am merely meeting on cross examination what you purport to say on direct examination, Mr. Elman. At that I think you are doing as well as many of them down at the OPA, as I have observed them. I am asking you whether you know that in the month of August 1943, beginning then and continuing ever since, you have been under an OPA ceiling of 25 per cent in your mark-up. A. Yes.

Q. So that had this contract been carried out,

(Testimony of Philip Elman.)

under these price lists or anything else, for three months, beginning with the fourth car and continuing under this contract, you could in no event have sold at a greater mark-up than 25 per cent; now, you know that, don't you?

A. No, I don't think so. At least, my understanding of it would be that since our price was established prior to this one, the price fixing of the merchandise took place before this law came out and subsequent to that. It differentiates—it says anything you purchase from this time on shall be at a fixed mark-up. Our contract and purchase of the wine happened prior to this. We had already established an OPA price on that merchandise. I doubt very [277] seriously whether this would have meant a retention in price. So far as I am concerned, I don't believe it would have. We would have kept the same prices.

Q. Aside now from the New York State Authority price——

A. Yes.

Q. ——had you prior to August 1943 ever established with the OPA any price?

A. Oh, yes.

Q. When and where and with whom?

A. When the OPA came out, when New York State took on the new Hallowell bill, a law which stated we had to submit the price to them the month preceding the month in which we were going to sell it, and when the OPA came out with prices, the Hallowell stipulated the top sheets of every distributor were to read that all prices submitted in

(Testimony of Philip Elman.)

New York State conformed with OPA price regulations, to which we attested, after we had gotten our price from OPA.

Q. Beginning with what date?

A. I don't recall the exact dates. It was prior to that when the OPA fixed the price of merchandise in the liquor business. We filed the New York State schedule with that in mind. New York State required that qualification in the prices submitted to that.

Mr. Naus: If the Court please, at this time, as long as Mr. Elman has been recalled, I would like to reopen for a question or two that I intended to ask him when he was on the stand before and that I overlooked.

The Court: Very well.

Mr. Naus: Q. Mr. Elman, Park, Benziger & Company is merely a subsidiary owned 100 per cent by another corporation, isn't it? A. It is.

Q. And what is the name of that other corporation? A. Finlay, Holt & Company. [278]

Q. You were answering Mr. Bourquin something about the incorporation of Park, Benziger & Company. The fact of it is it has never had a capital of more than \$1,000, has it?

Mr. Bourquin: What do you mean by that?

Mr. Naus: Just what I say.

Mr. Bourquin: We object to the question as indefinite, your Honor.

The Court: Overruled.

(Testimony of Philip Elman.)

A. No. And may I explain that answer, your Honor?

The Court: Yes.

A. Park, Benziger & Company has \$1,000—oh, what would you call it in legal terms?—capitalization, in other words. That is more or less to limit the liability of the officers of Finlay, Holt & Company, the personal liability of the officers of Finlay, Holt & Company. The company gets its money from Finlay, Holt & Company, adequate funds, sufficient sums to carry on a business extending over a million and a half dollars a year in 1942, and increasing since then up to the present time to approximately over three million dollars a year, which can be done on a thousand dollars. We pay a license in the State of New York as a wholesaler of \$4,000 a year, plus licenses we have in all States that we do business with and require it, which runs into several thousand dollars a year, plus the salaries of employees, and so forth, which runs for the overhead of the concern into quite a considerable amount of money. Of course, that all cannot be done on a thousand dollars. So the funds are drawn from Finlay, Holt & Company as they are required by Park, Benziger & Company. There are 20,000 shares actually issued against it, of which there is \$1,000 put into the capitalization stock. [279]

Q. In other words, when this plaintiff corporation was organized its issued capital stock was issued against \$1,000 in cash, and that is the only

(Testimony of Philip Elman.)

capital as such that has ever been paid to Park, Benziger & Company; have I got it right?

A. Well, you mean paid in to Park, Benziger & Company?

Q. Yes, when the stock was issued by Park, Benziger & Company to Finlay, Holt & Company, which owned it, \$1,000 in cash was paid in as the capital against that stock? A. That is correct.

Q. Then if, as and when Park, Benziger & Company made any profit since, it has immediately been paid out in dividends to Finlay, Holt & Company, hasn't it?

A. Not immediately; at the expiration of the year.

Q. Maybe I can put it in another way. Is it or is it not a fact that any businessman picking up at any time the current balance sheets of Park, Benziger & Company would find current assets and current liabilities just about equal or at a stand-off?

A. That is the way it is done with all subsidiary corporations in most circumstances. U. S. Steel—their subsidiaries balance one another because the mother holding corporation is the one that shows the difference.

Q. I haven't heard the word "Yes" or I haven't heard the word "No" in your answer.

A. I am sorry.

Q. Do you mean to say Yes, anybody picking up the balance sheet of Park, Benziger & Company at

(Testimony of Philip Elman.)

any time, any current balance sheet, would find current assets and current liabilities were not equal or at a standoff?

A. No, our latest statement came through a little differently.

Q. I will put it this way, then: Anybody up to and including April 27, 1943, picking up a current balance sheet, would find [280] current assets and current liabilities just about at a standoff?

A. Yes.

Q. And I understood you to say that that structure was set up to protect somebody against incurring any liability in connection with the operations of Park, Benziger & Company; is that right?

A. The officers of the mother holding corporation.

Q. You mean the officers or the holding corporation itself?

A. Well, I don't know corporate laws. We are going to get a little involved now.

Q. Let us put it this way: They set up this Park, Benziger Company on that type of capital structure and handled it in the way we discussed——

A. Yes.

Q. In order to protect whoever was interested in Park, Benziger & Company from facing any possible liability?

A. Oh, no, definitely not.

Q. What did you mean, then? It was done to limit the liability of somebody?

A. I mean my understanding, which might be

(Testimony of Philip Elman.)

poor, is that in this particular instance it means that the individual limitation—of course, your Honor could help me on that, I guess—the individual limitation, the individual person who is an officer in Park, Benziger & Company and in Finlay, Holt & Company is limited in his personal loss, so far as that was concerned. But Finlay, Holt & Company was solely responsible for any liabilities of Park, Benziger & Company, because they own all our stock.

Q. Did Finlay, Holt & Company ever sign a paper and send it to the Bercuts telling the Bercuts they would stand behind this Hermann contract?

A. It was not necessary. They didn't ask for it.

Q. Was it ever done? A. No. [281]

Mr. Naus: That is all.

Redirect Examination

Mr. Bourquin: Q. What was the nature of the Finlay, Holt Company?

A. I beg your pardon?

Q. What is the nature of the Finlay, Holt Company, the parent company?

A. They are exporters and importers and a financing corporation—bankers.

Q. Are you familiar with their capital structure?

A. They run about \$160,000, I believe, in their paid-in capital structure. [282]

Q. Did these gentlemen, prior to this break-up, ever raise any question about the credit capacity or standing of this firm? A. No, sir.

(Testimony of Philip Elman.)

Q. Was that information always available to them through Dun & Bradstreet's?

A. Yes, sir.

Q. Still is? A. Yes, sir.

Q. May I ask a question back again on this subject of your New York price, so we will understand? They were fixed with reference to ceilings and with reference to mark-up, is that it?

A. That is right, sir.

Q. Will you tell me whether or not in the months of May, June, and July, let us say, your market or your demand that you described continued or abated?

Mr. Naus: That is not proper redirect, your Honor. Objected to as such.

Mr. Bourquin: A while ago he wanted to stand on the month of April. Now he has advanced his own theory into the month of August, and even beyond, and he wants to use his own interpretation of the OPA mark-up regulations to control the period beyond. I think if he does that we ought to be permitted to go into it.

The Court: No question was asked as to whether the market continued or abated.

Mr. Naus: I only asked about the price lists.

The Court: The objection is sustained.

Mr. Bourquin: Q. Did your posted prices in New York on wines of this character maintain or decrease following the filings you have shown us here in evidence?

(Testimony of Philip Elman.)

Mr. Naus: One moment. Objected to as assuming that after April, 1943, there were any posted or published prices of wines in this class, and on the further ground the witness has negatived [283] the idea that they ever posted or published any after May, 1943.

The Court: You said after May?

Mr. Bourquin: I did, your Honor.

The Court: Sustained.

Mr. Bourquin: Q. Did your acquaintance with the wine business continue after May, 1943?

A. It did.

Q. You were just as anxious then to get wine, were you? A. Yes.

Q. Just as anxious to get as many wines as you could get, is that right? A. Yes.

Q. Did the wine prices in New York on wines of this type fall off after May of 1943? Did they fall off after May, 1943?

A. Oh, no, they went up.

Mr. Bourquin: That is all, Mr. Elman.

Mr. Naus: No further questions. [284]

Mr. Bourquin: That, your Honor, is the plaintiff's case.

(Plaintiff rests)

Mr. Naus: At this point, if the Court please, without waiving any rights under Rule 50, I will call Jean Bercut.

United States
Circuit Court of Appeals

For the Ninth Circuit.

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as Copartners doing business as P & J CELLARS, a
Copartnership,

Appellants,

vs.

PARK, BENZIGER & CO., INC., a Corporation,

Appellee.

and

PARK, BENZIGER & CO., INC., a Corporation,

Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually, and
as Copartners doing business as P & J CELLARS, a
Copartnership,

Appellees.

Transcript of Record

In Two Volumes

FILED

VOLUME II

NOV - 6 1944

Pages 343 to 550

PAUL P. O'BRIEN,
CLERK

Upon Appeals from the District Court of the
United States for the Northern District
of California, Southern Division.

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**Upon Appeals from the District Court of the
United States for the Northern District
of California, Southern Division.**

JEAN BERECUT,

Called for the Defendants. Previously sworn.

The Court: Just one minute.

Mr. Naus: Shall I proceed?

The Court: You say without waiving any rights?

Mr. Naus: I say without waiving any rights under Rule 50 I now call this witness. In other words, Rule 50 gives me the right to make a particular type of motion at one or the other time.

The Court: Yes.

Mr. Naus: I am announcing I intend to proceed with the witnesses at this point.

The Court: Very well.

Mr. Naus: Notwithstanding that I planned a motion, but I prefer the motion under the second paragraph than the one permitted under the first paragraph.

The Court: Yes.

Mr. Naus: Shall I go ahead with the witness?

The Court: Yes.

Direct Examination

Mr. Naus: Q. Mr. Bercut, in the month of June, 1943, or at any time before that, did you know that if, after January 29, 1943, you did not deliver wine to Hermann or his assignee, that they would not be able to get other wine in the market to take the [285] place of it? Did you know that?

A. No, I wouldn't know.

Q. There has been a reference here to a conference among a group of you gentlemen on April 26,

(Testimony of Jean Bercut.)

1943, down at the office of Merchants Ice & Cold Storage Company. You were one of those persons, were you? A. Yes.

Q. You all met down there at what hour, about?

A. Ten o'clock in the morning.

Q. It has been stated in the evidence so far that you were there, and your brother, Peter, Mr. Evans, and that at times Mr. Elman was in the room with the rest of you, and at other times Mr. Hermann was in the room with the rest of you.

A. That's right.

Q. When the meeting began was Mr. Hermann among all of you?

A. No; Mr. Elman was there first.

Q. Elman? A. Elman, yes.

Q. So when the meeting began it began among those people I have named, except Hermann?

A. Yes.

Q. State the substance of what was said at that first meeting at which Elman was present; the substance as best you recall it, and who said what.

A. Well, I started the talking. I told Mr. Elman in the presence of my brother, and also Mr. Evans there, that I found out that Mr. Hermann, Serge Hermann, was not honest. I found out also that he had no license to operate, and I told these facts to Elman.

Q. Mr. Elman? A. Mr. Elman, yes, sir.

Q. All right. You state what you said. Now, what did anybody else say, if anything?

A. Then Mr. Serge Hermann was called in and

(Testimony of Jean Bercut.)

I repeated the story to him, what I told Mr. Elman.

Q. When you say you repeated the story, what did you tell either Elman or Hermann was the particular story that you had heard? [286]

A. Yes.

Q. Did you tell them anything about a Mr. Feldheym? A. Yes.

Q. Tell the jury what you told them at that time, as best you recall it.

A. I told them that I received a telephone call from a wine man at the Palace Hotel, and his name was Mr. Jacobi; he was a manufacturer of vermouth, a wine man in New York. I have his card here.

Q. You can hand it to the reporter.

A. So this Mr. Jacobi called me in the butcher shop. I was working in the butcher shop at that time.

Q. All right. Don't tell us now what Jacobi separately told you; tell us only what you told Hermann or Elman that you had been told.

A. Yes. I am telling them that this Mr. Jacobi called me at his hotel room at the Palace Hotel, and he told me that he had just heard a contract existed between P & J Sellers and Chateau Montelena.

Q. Of New York?

A. Of New York. He asked me if I was the party who had signed that contract, and he also told me that Serge Hermann had offered these wines

(Testimony of Jean Bercut.)

contained in that contract; he was going to sell them to him if Park, Benziger was not going to arrive in a couple of days; he was long due already, and he was going to trade with Mr. Jacobi. So Mr. Jacobi said he wasn't going to trade with him for two reasons: because Serge Hermann was not honest; and second, because he had no license. And he said to me, "If you want to check on it, go and see Mr. Feldheim, the owner of Chateau Montelena.

Q. Of California?

A. Of California. So I went to see him. [287]

Q. Let's get back to the conference of April 26th.

A. That is it.

Q. Proceed.

A. Then I went to Mr. Feldheim and I told him, I brought my contract with me, and I—

Q. You mean this contract in evidence here?

A. Yes.

Q. Plaintiff's Exhibit No. 2?

A. Yes. I said, "I have just heard from a man from New York that you had business transactions with Serge Hermann," and he says, "To my sorrow, yes, I did." There was some transaction with Serge Hermann, and he told me at the time that he had a contract that was like ours, where Mr. Serge Hermann was involved to dispose of all Chateau Montelena wines, and they had an agreement between themselves for a carload of wine that went to Serge Hermann in New York, and when the carload of wine got there the carload was not paid for, which

(Testimony of Jean Bercut.)

he didn't pay yet for, and while the carload of wine was traveling back to New York Mr. Feldheim had to dispose of 750 cases of wine in Detroit.

Q. Detroit, Michigan?

A. Detroit, Michigan.

So being that Mr. Serge Hermann was his agent, he called Serge Hermann on the telephone and told him, "You go to — I will provide you with power-of-attorney to go and dispose of 750 cases of wine in Detroit." So he also disposed of the 750 cases of wine and never did account for it yet at the present date. He sold also his wine. I told all that story in the office in the presence of Hermann and Elman and my brother and Mr. Evans.

Q. What did either Mr. Elman or Mr. Hermann say?

A. There is another thing that I forget. In the meantime Mr. Jacobi told me that Hermann had lost his license, and that it was [288] one of the reasons he didn't want to deal on this wine with him. So I went to the Board of Equalization and asked, I says, "How do I stand now? I sold 27,000 cases of wine to a man in New York. He had a license when he bought this wine, but he has no license now," and I say, "How would I stand?"

They told me, they said, "Do not sell any wine to him, because you are going to get in trouble; the man is out of business, you can't deliver any wine to him."

So I also told Mr. Elman and Mr. Hermann these facts.

(Testimony of Jean Bercut.)

Q. This was at the meeting of April 26th?

A. Yes.

Q. What, if anything, did either or both of them say about all this?

A. Hermann says, "If you are not satisfied with us, we cancel." Mr. Elman said the same way, "If you are not satisfied with us, why, if you don't think we are the right people, we cancel." And he looked in his pocket—

Q. Who did?

A. Elman. He said,—he look—looked in his pocket, and said, "I have the contract here. I will be willing to return it to you." After he looked in his pocket he said, "No, I haven't got it with me; it is up at the hotel room," he says, "You can come with me and I will return it, it's all right with us."

Q. Was anything said at that meeting on April 26th about any paper being prepared to sign to cancel this contract?

A. After he suggested, himself, that we should cancel that contract we—I believe it was my brother who told—

Q. Your brother Peter?

A. Peter—who ordered Evans to get up a cancellation and we would return the next day and sign it.

Q. Was there any appointment made to get together for the next morning?

A. Yes. We agreed on the time, and I went and picked up the gentlemen and drove them back to

(Testimony of Jean Bercut.)

the office of the [289] Merchants, and they proceeded to sign the cancellation of that contract.

Q. When the meeting broke up on the 26th did you meet Mr. Elman or Mr. Hermann outside the Merchants Ice Office anywhere, talk with him further? A. On the evening of the 26th?

Q. Not the evening; the afternoon.

A. Here is what happened—

Q. Did you see them previously—

A. Here is what happened. About a week prior to this day Hermann asked me if he would appreciate very much if I would entertain and take Mr. Elman to my house for dinner, which I told him—

Q. Mr. Elman asked you to invite Mr. Hermann out? A. No.

Q. Mr. Hermann asked you to invite Mr. Elman out?

A. Mr. Hermann asked me to invite Mr. Elman out; he would appreciate that very much—to my house for dinner. And it happened that same night of the 26th, it happened to be the date that we had arranged ten days previous to that, or a week previous to that. So Mr. Elman came to me and he said, “Is that all right for this fellow to come to your house?”

I said, “Perfectly all right.” I said, “Sure; it’s all right.” So I took him. I called in the evening and I took him back. I called for them and took them to my house for dinner. That’s what hap-

(Testimony of Jean Bercut.)

pened. Also, when I returned Elman and Hermann back to their room, this Mr. Elman surrendered the contract that he had promised to us to do during our discussion.

Q. This paper here, this batch of papers, Plaintiff's Exhibit No. 2 in this case, are these the very papers that Elman handed to you in the hotel on the 26th?

A. Yes, it is; that was the end, he gave them back.

Q. What, if anything, did he say to you when he handed those [290] papers back to you in the hotel on April 26th?

A. He says, "There is your contract," and he handed it to me.

Q. Now, going back for a moment to the morning of April 26th in the office there, during the conference that you had there did anybody present use the word "release," or the words "personal release," during that conference?

A. There was no such a thing. That was meant for the both of them. There was no such thing as personal release. Nobody there ever mentioned that thing.

Q. That is "release"?

A. Yes; "personal release."

Q. What word or words, if any, were used as to what was to be done with the entire contract?

A. That was to be a cancellation of the entire contract, a cancellation of the contract.

(Testimony of Jean Bercut.)

Q. Prior to Mr. Elman's handing to you, up at his hotel room, these papers here that make up Plaintiff's Exhibit No. 2, do you—had you ever, before then, seen any paper purporting to be a paper of assignment? A. No.

Q. From Serge Hermann or Chateau Montelena of New York to Park, Benziger & Company?

A. Up to the 26th we had no knowledge of this agreement that Hermann and Park, Benziger had.

Q. You mean assignment?

A. No knowledge; we were told that day.

Q. In this conference on the morning of April 26th was there some talk among you folks there about an assignment, or assigning the contract?

A. Yes.

Q. Tell us what was said by each of those present, or the substance of it as best you can, what was said.

A. Well, what happened was, I asked Hermann, I said, "Now, what is the setup of that Park, Benziger?" I said, "What is your connection; what is your setup?" And then Hermann did not answer that, but Elman did. [291]

Q. Mr. Elman answered it?

A. Yes. He said, "We have a"—what do you call it—a transfer—

The Court: Q. Assignment?

A. Assignment. "We have an assignment, but we have neglected to have you witness this assignment; we should have done that as soon as I arrived

(Testimony of Jean Bercut.)

in San Francisco. We should have had you witness the assignment of that contract, which we have neglected to do. We should have done it," he said.

Mr. Naus: Q. You all met again on the morning of April 27th at the same office?

A. That's right.

Q. You met at what time, approximately?

A. Must have been ten o'clock in the morning.

Q. Around ten o'clock in the morning. The same persons present?

A. Yes.

Q. But this time none of them were out of the room while the rest were there; they were all present at the same time?

A. That is correct.

Q. Tell us what happened on the morning of April 27th. What was said when you arrived and what was done?

A. I brought these gentlemen from the hotel and brought them in the office. As soon as we met, my brother, Peter, he was there waiting for us. As soon as we arrived there we all sat down, and then it was five copies, or six copies, of these cancellations of that contract on top of the desk.

Q. A lot of carbon copies?

A. Yes. So we each grabbed one and all looked at it, and everybody was satisfied with it. Hermann had one, I had one, my brother had one—everybody had one. So we ask him if that cancellation was satisfactory.

Q. Asked who?

(Testimony of Jean Bercut.)

A. Hermann. And Hermann said yes, and he signed it. [292]

Q. Was anything said to or by Mr. Elman in connection with the reading or signing of the cancellation?

A. Elman told him it was all right to sign it.

Q. Who told whom?

A. Elman told Hermann that it was all right to sign it.

Q. After the paper was signed,—and we are referring now to this paper marked Plaintiff's Exhibit 11, that paper of cancellation, that was the one that was there that morning— isn't it one of them?

A. What?

Q. I say, that is one of the papers that was there that morning?

A. Yes.

Q. After that was signed and turned over to you folks, what happened next at the office?

A. My brother, Pete, left, shook hands with everybody, and he went.

Q. Your brother, Pete? A. Yes.

Q. After Peter left what happened?

A. So we were sitting there; Evans was there. And they asked me if they could buy wine. I said, "Sure, you can buy all the wine you want, but it is going to be a cash price from now on," because I find out if you sell wine and they are going to pay as the car travels, or when the car arrives over

(Testimony of Jean Bercut.)

there, and if there is their own label on these bottles it means that the car is not paid for on arrival at New York and I cannot dispose of these bottles myself, because they have their labels on, that is, their own labels, and I, myself, can't do anything with the wine over there. The only thing I can do is to bring back these bottles, back to my warehouse, and go to the Federal authorities and have a permit to remove the bottles and break up the cases, and that gives us a lot of damage, a lot of trouble. I didn't want to do that. Therefore, I told these gentlemen they could have all the wine they wanted for a letter [293] of credit, irrevocable letter of credit; that is what I told them, before I put their own labels on my bottles.

Q. On the morning of April 27th there, after your brother, Peter, had left, there was Elman, Hermann, yourself, and Mr. Evans, still there?

A. Yes.

Q. And your offering of wine, then, as I understand it, was on a cash basis?

A. Yes; they have to pay.

Q. An irrevocable letter of credit before the wine was loaded and shipped? A. Yes.

Q. What price, if any, did you name?

A. At the price in that contract; I was satisfied with that.

Q. You mean the same price as stated in the cancelled contract?

A. I didn't ask for any more money.

(Testimony of Jean Bercut.)

Q. You told them they could have that same wine? A. Yes.

Q. But on cash?

A. Yes. We sold them a carload of wine later, at their request, for cash.

Q. But none of the wine covered by the contract?

A. No; that was at the time they sued us, we sold it.

Q. In that conversation there on April 27th that we are now speaking of, did you, or not, say that you would let them have three cars only, for cash?

A. No. That is what they say before. I never mentioned that.

Q. I am asking you whether you said that.

A. No.

Q. Did you limit your cash offering to Mr. Elman or Park, Benziger & Company in any way as to the amount you would let them have; did you limit it?

A. No, no; all they wanted.

Q. Did you ask any higher price for any of the wine you had on hand? A. No.

Q. On April 27, 1943, did you, or not, still have on hand all of the wine covered by the contract, Plaintiff's Exhibit 2? [294]

A. What date?

Q. April 27, 1943, and while you were in there signing up that cancellation. A. Yes.

Q. You had it still on hand? A. Yes.

Q. All of it still on hand. A. Yes.

(Testimony of Jean Bercut.)

Q. Tell me also, Mr. Bercut, whether before January 29, 1943, whether you or your brother Peter, or both, had ever before been in the wine business.

A. No.

Q. Had either you or your brother, or both, ever, before January 29, 1943, sold any wine to anybody anywhere in the world?

A. No.

Q. Before the week in which the 29th of January fell was or was not Serge Hermann a complete stranger to you?

A. Yes.

Q. Before the week of January in which the 29th fell had you ever heard of Park, Benziger & Company?

A. Never.

Q. About how long had you had the stock of wine on hand at the time the contract was signed up with Serge Hermann on January 29, 1943?

A. Two years.

Mr. Naus: You may cross examine.

Cross Examination

Mr. Bourquin: Q. Mr. Bercut, would you have acted any differently about the matter if you had known that Park, Benziger Company could not have replaced that wine from some other source?

The Witness: I don't get it; will you please repeat it?

The Court: Read the question.

(Question read by the reporter.)

(Testimony of Jean Bercut.)

A. No.

Mr. Bourquin: Q. It didn't make any difference to you in the way you handled it, and your concern handled their dealings in this matter, whether Park, Benziger could, or could not, have [295] bought wine at some other place, did it?

A. I don't know whether it would or not.

Q. It didn't govern your conduct in the matter, did it?

A. No.

Q. That they could or could not? A. No.

Q. Say, Mr. Bercut, did you know prior to April 26th, the date you first called our attention to, that Park, Benziger had taken over the marketing of this wine, and that you were dealing with Park, Benziger? A. No.

Q. Did you know that?

A. No information; knew nothing about it.

Q. Do you read the same mail at the office that is addressed to Peter at the office, there, or who was handling the mail on the transaction?

A. Well, we have our bookkeeper to write—

Q. What's the answer?

The Court: Read the question.

(Question read by the reporter.)

The Court: Q. Do you read the mail?

A. Yes.

Mr. Bourquin: Q. Did you know, prior to April 26th—in fact, prior to Mr. Elman's visit to San Francisco—that Park, Benziger were making

(Testimony of Jean Bercut.)

arrangements to prepare for the labels to be placed upon the wines that were the subject of this contract, that you had in storage? A. Yes.

Q. You knew that? A. Yes.

Q. Who did you think you were dealing with on February 26th when your brother, Peter, wrote the letter that is here marked Plaintiff's Exhibit No. 5? Will you take a look at it, please (handing letter to the witness)?

A. Yes. Well, I think that letter refers to Chianti wine.

Q. Yes, I know it refers to Chianti, but just go on and read it. [296]

A. Yes.

The Court: Read Mr. Bourquin's last question.
(Question read by the reporter.)

A. The 27,000 cases we were dealing on with Hermann. The Chianti wine we were dealing through the mail with Park, Benziger, on this letter.

The Court: Read the answer of the witness.

(Answer read by the reporter.)

Mr. Bourquin: Q. Is that your understanding of the letter at this time? A. Yes.

The Court: The jury will please remember the admonition heretofore given. We will continue the trial until tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken until Friday, March 17, 1944, at 10:00 o'clock a.m.) [297]

(Testimony of Jean Bercut.)

Friday, March 17, 1943, 10:00 O'Clock a.m.

The Court: The jurors are present in the case of Park-Benziger Co. v. Bercut, et al. You may proceed.

JEAN BERECUT,

recalled;

Cross Examination

(Resumed)

Mr. Bourquin: Q. Mr. Bercut, calling your attention to your statement that someone called to your attention that Mr. Hermann, some experience with Mr. Hermann; do you know what I have in mind? A. Will you please repeat that?

The Court: Read it.

(Question read.)

A. Yes.

Mr. Bourquin: Q. You said that someone had phoned you at the Palace Hotel. A. Yes.

Q. You visited him? A. Yes.

Q. And he then voiced to you, you say, some complaint that you in turn voiced at the meeting on April 26th. A. Yes.

Q. Did that complaint involve Park-Benziger?

A. No.

Q. In your discussion of the matter with the man at the Palace Hotel, or from the Palace Hotel, was the name of Park, Benziger & Company mentioned by that man? A. Yes.

Q. Did that man have anything to tell you to indicate anything unsatisfactory on the part of Park-Benziger and their ability to do business?

(Testimony of Jean Bercut.)

A. No.

Q. And their habits of doing business?

A. No, sir.

Q. Let us say, first, up until the time of the meeting of April 27th, which you testified about, you had heard from no one anything derogatory about Park, Benziger & Company; is that true?

A. No. [300]

Q. You had not heard anything against them, their business reputation? A. No, sir.

Q. So far as you knew, it was perfectly all right, was it? A. Yes, sir.

Q. Yes. You had been dealing with them, Bercut Bros. had been dealing with Park-Benziger at the time and before the meeting on April 26th, had you? A. Yes.

Q. You had found them in their business relations with you perfectly all right, had you?

A. Yes.

Q. You had shipped them commodities by car-load? A. Yes.

Q. And they had responded in a way entirely satisfactory to your concern? A. Yes.

Q. Now, sir, I understood you to say that when you brought this matter about Mr. Hermann to attention on April 26th you did not understand that you were then dealing with Park, Benziger & Co.; was that your testimony? A. Yes.

(Testimony of Jean Bercut.)

Q. You knew then who Mr. Elman was, didn't you? A. Yes.

Q. He had been introduced to you as the representative of Park-Benziger prior to that time?

A. Yes, sir.

Q. You had met him, met with him on four or five occasions, or five or six occasions prior to that time? A. Yes.

Q. On the occasion when the contract here and the matter covered by the contract were discussed?

A. What was that?

The Court: Read the question.

(Question read.)

A. No.

Mr. Bourquin: Q. You met with Mr. Elman five or six times before April 26th, had you?

A. Yes.

Q. At your place of business? A. Yes.

Q. Both at the Grant Market?

A. Yes. [301]

Q. And also at your storage plant, Merchants Ice & Cold Storage?

A. Yes.

Q. On those occasions when he was there with you, and you with him, had you not discussed this wine transaction that the contract covers?

A. Yes.

Q. You had discussed the casing and shipping of the commodities covered by the contract, had you? A. Yes.

(Testimony of Jean Bercut.)

Q. Had discussed the labeling of it, had you?

A. Yes.

Q. You had seen Peter Bercut cut one of the labels produced from Bercut Bros. on a bottle and had seen Mr. Elman cut another in the style he said was better?

A. No.

Q. Don't remember that?

A. I was not there.

Q. Did Peter tell you that that transpired?

A. No.

Q. Did you hear Peter testify to that on the last trial of this case?

A. I don't remember, sir.

Q. Prior to your meeting on April 26th, correspondence had passed between Bercut Bros. and Park-Benziger?

A. Yes.

Q. You had seen the correspondence?

A. Yes.

Q. Who handled the correspondence, you or your brother, Peter?

A. Well, my brother, Peter, dictated the letters and I seen the letters.

Q. You saw them. Were you present when they were dictated?

A. No. I saw the copies.

Q. Did you see the letters that came in from Park-Benziger?

A. Yes.

Q. You saw them signed by the president, Mr. Benziger?

A. Yes.

(Testimony of Jean Bercut.)

Q. You saw a letter signed by Mr. Elman, the vice-president?

A. I don't remember that.

Q. You don't remember that? A. No.

Q. You knew when Mr. Elman was in San Francisco that he was here [302] as a representative of Park-Benziger? A. Yes.

Q. When you had received this detail, or this story about Mr. Hermann which you say in no wise involved Park-Benziger, whom did you first take that matter up with, Mr. Elman or Mr. Hermann?

A. Mr. Elman.

Q. Mr. Elman? A. Yes.

Q. In the meeting on the 26th when Mr. Elman and Mr. Hermann, as they had the days before, arrived at the plant, in order to bring up that matter you asked Mr. Elman to come in privately, and you asked Mr. Hermann to wait outside?

A. Yes, that's right.

Q. At that time you voiced to Mr. Elman your dissatisfaction with Mr. Hermann? A. Yes.

Q. As you said yesterday, you told him this tale, or story, at some length, about what you had heard about Mr. Hermann? A. Yes.

Q. By the way, when had you first heard that information about Mr. Hermann?

A. Mr. Hermann.

The Court: When had you first heard that about Mr. Hermann?

A. It was a few days prior to the 27th; I don't remember the date; a few days before the 26th.

(Testimony of Jean Bercut.)

Mr. Bourquin: Q. Well, how many days would you say?

A. Well, I would say four days.

Q. Four days? A. Yes, four or five days.

Q. You met with Mr. Elman and Mr. Hermann between that time and the 26th, had you?

A. Yes, sir.

Q. But it was on the 26th when you first voiced the matter at all?

A. When I first finished my investigation with the Board of Equalization, which they asked me three days to answer that matter, and by the time I went through all the records with Mr. Feldheym, the letters and files, the correspondence between [303] Hermann and Feldheym, and my investigation was complete on Saturday, the Saturday previous to the 26th. The 26th was on Monday morning, and my investigation was finished on Saturday noon.

Q. In the course of your investigation of that information did you encounter anything derogatory to the business repute or habits of Park-Benziger?

A. Well, I find out they were not any too well financed.

Q. You did find that out?

A. Yes; my bookkeeper got that information.

Q. When did you find that out?

A. That was also at the same time.

Q. Also at the same time? A. Yes.

(Testimony of Jean Bercut.)

Q. Do you recall giving your deposition in this action on September 2, 1943? A. Yes, sir.

Q. Your counsel, Mr. Naus, was present?

A. Yes, sir.

Q. I want to ask you concerning certain statements made at that time, at page 42.

Mr. Naus: You may proceed to show it or read it to him, as you choose.

Mr. Bourquin: Whatever you like; I will do either.

Mr. Naus: Take your choice.-

Mr. Bourquin: Well, I will read it to him. If there is any question he may see it.

Mr. Naus: The deposition was given, yes. You can simply state it to him and if he wishes he may see it.

Mr. Bourquin: Q. Did you give this testimony at line 10:

“Did you then check up to see whether Park, Benziger & Co. had any ability to perform this contract either from a financial or from a license standpoint? A. No.

Q. You never checked up?

A. No. [304]

Q. You don't know? A. No.”

The Witness: A. Yes.

Q. Did you give that testimony?

A. I stated my bookkeeper investigated and he told me he had a report that Park-Benziger were under-financed, not financed enough.

(Testimony of Jean Bercut.)

The Court: Were what?

A. Under-financed, not enough money.

Mr. Bourquin: Q. Did you give the testimony that I read to you out of the deposition?

A. What was that?

Q. Did you give the testimony at the deposition I just read to you? A. Yes.

Q. Is it true, as you said there, that at the time that you gave the deposition you had then never checked up on the financial ability of Park-Benziger to perform the contract?

A. Not myself, but our bookkeeper did.

Q. Did you know anything about the financial ability of Park-Benziger to perform the contract at the time you gave the deposition?

A. Yes. Mr. Elman, during the cancellation of the contract, explained to us that they did not have any money to pay cash, because they had money that was frozen in England, or in Scotland, or some place, and their present cash, they had no present cash; Elman told us that during the time we do business on the cancellation.

Q. When you gave the testimony why didn't you mention, if you knew anything at all, as to the financial ability or integrity of Park, Benziger & Co.?

A. Well, I am telling you what I find out from my bookkeeper, and also Mr. Elman, himself.

Q. Well, had you found that out from your bookkeeper before September 2, 1943, when you testified under oath that you did not know anything

(Testimony of Jean Bercut.)

of the financial ability or integrity of Park, Benziger & Co. [305]

A. Well, I might have said so, but that is what my recollection is now.

Q. What has caused you to make the correction between September 2nd and the present time?

A. Well, as I remember these things as they happened, and as we talk about it, as we remember it, try to remember about what did happen.

Q. Do you mean to be understood, you say, that at the time of the deposition you had simply failed to remember that you had had some information on that subject; is that correct?

A. Yes.

Q. Now, Mr. Bercut, when you talked with Mr. Elman on April 26th privately, and before you said anything about the matter to Mr. Hermann, concerning Mr. Hermann, did you say, when you testified, to Mr. Elman that there was any question in your mind about the ability of Park, Benziger & Co. to perform that contract? A. No.

Q. You did not? A. No, sir.

Q. In other words, at the meeting on April 26th, where you contend now that you voided your contract, there was nothing said by you to Elman concerning the ability of Park-Benziger to perform that contract, was there?

A. No, I never said anything, but he said it, himself, that he didn't have the cash.

Q. Let me read you your testimony, something

(Testimony of Jean Bercut.)

from your testimony on the last trial concerning that subject; page 75, Mr. Naus, of the transcript of the last trial. I will proceed as I did before, unless you have some objection, Mr. Naus. At page 75, line 25, I will read you the question there—I think I will go back to pick up the context of it at line 13. Question by Mr. Breslauer:

“Q. I believe in your testimony you stated, Mr. [306] Bercut, that you offered Mr. Elman some wine. I am referring now to April 27th.

A. That is right.

Q. After that document was executed. Now, what wine did you offer to him and at what prices?

A. The contract price, \$5.25.

Q. And what wines?

A. The wines that were in that contract.

Q. Did you limit in any way the amount of wines that you offered to him that way?

A. No, give him all the wine he wants.

Q. Did you offer to him three cars and no more?

A. No.

Q. Did you offer to him wines at a higher price?

A. No, sir, no, sir.”

The Witness: That’s right, correct.

Mr. Bourquin: (Resumes reading):

“Q. If you wanted to give him all the wine that he wanted, why didn’t you go ahead with the contract with Park, Benziger & Co.?”

(Testimony of Jean Bercut.)

A. Well, it didn't look so good with Hermann, what I found out, been so bad actors, you know, robbing everybody. It wasn't interesting, never pay for anything that they had purchased ever.

Q. And that was your only reason for not going ahead with the contract with Park, Benziger & Co.?

A. Yes—well, that was Mr. Elman's suggestion that we cancel that contract. He suggested it.

Q. Your dealings with Park, Benziger & Co. on the sale of Chianti wine up to that time had been entirely satisfactory, had they not?

A. Yes, sir. Well, we were willing to proceed and sell them more wine."

Was that your testimony at the earlier trial?

A. Yes.

Q. Is it true, that the dissatisfaction which precipitated your [307] action on April 26th related entirely to Hermann and in nowise involved Park, Benziger, your relations with Park, Benziger?

A. It was two reasons why we—

Q. Just a moment. Please answer "Yes" or "No," and if you wish you may explain your answer.

A. The reason we didn't want Hermann—

Q. Just a moment.

A. Yes, Hermann, for one reason, and then—

Q. Let me ask the question again: Is it or is it

(Testimony of Jean Bercut.)

not true that the dissatisfaction which prompted your action on the 26th related entirely to Hermann and had nothing to do with Park-Benziger?

A. It had to do with Park-Benziger, too.

Q. It did have to do with them? A. Yes.

Q. Let me read you your testimony from the trial again:

“Q. And that was your only reason for not going ahead with the contract with Park, Benziger & Co.”—your reference to Hermann—and your answer was:

“Yes.”

Did you give that testimony? A. Yes.

Q. Was that correct when you gave it?

A. Yes.

Q. Has anything happened between trials to lead you to believe it should or could justifiably be corrected.

A. Yes. We found out Park-Benziger was not financed and that when they put their labels on our own bottles we can't control those bottles any more, we can't do anything.

Q. When did you find that out, since the last trial?

A. No; Mr. Feldheym, the man who lost his wine, is here sitting in the court-room. He told me before that.

Q. When did he tell you that?

A. The first meeting.

Q. Why didn't you tell that when your deposi-

(Testimony of Jean Bercut.)

tion was taken? You said you didn't know anything about Park-Benziger's ability to [308] transact business.

A. I am talking about what Feldheym—

Q. Why didn't you tell us that at the trial when you said your relations with Park-Benziger were entirely satisfactory?

A. Yes.

Q. And you were perfectly willing to go ahead and sell them all the wine they wanted.

A. At cash price, yes, all they want. In fact, they bought wine while they were suing us for the price agreed on which we delivered, and we were very happy about it.

Q. Do you suggest now that Mr. Feldheym told you something about Park-Benziger rather than Hermann?

A. No.

Q. Or in addition to Hermann?

A. No.

Q. Nothing about Park-Benziger?

A. Feldheym never had anything to do with them. [309]

Q. Why did you take your complaint about Mr. Hermann up with Mr. Elman instead of Mr. Hermann?

A. I wanted Mr. Elman to know what we found out about him.

Q. Will you explain why you wanted him to know that, let us say, first?

A. I don't remember exactly what was the purpose at the time, but we agreed to do it that way,

(Testimony of Jean Bercut.)

to tell Mr. Elman what we found out about Hermann.

Q. Who agreed to that? You say "we agreed" to that. Who do you mean? You and your brother Peter? A. Yes.

Q. In other words, you and your brother Peter agreed that you would tell Mr. Elman what you found out about Mr. Hermann?

A. That is right.

Q. With no intention of telling it to Mr. Hermann at all, isn't that true? A. Oh, yes.

Q. Wasn't it at Mr. Elman's request that you later brought in Mr. Hermann and repeated the same charge to him?

A. No, sir, at our own request.

Q. What?

A. At our own request we called in Mr. Hermann after that and we told him what we found out about him.

Q. Let us leave that for a moment this way: There is no question about it but when you and Peter decided the information you had received about Mr. Hermann was cause for concern to you, you took that up with Mr. Elman first?

A. That is right.

Q. And not Mr. Hermann?

A. Correct.

Q. That is true.

A. That is true.

Q. That was before you procured the contract

(Testimony of Jean Bercut.)

Plaintiff's Exhibit 2 from Mr. Elman, wasn't it?

A. It was before, yes, sir.

Q. I understood your testimony of yesterday to be that you never saw the assignment in writing prior to Mr. Elman's giving you the Plaintiff's Exhibit 2, to which it is attached, [310] when you took him to this hotel on the afternoon of April 26; is that true?

A. Right you are. Never seen it before; never knew it existed.

Q. It was prior to that and, let us say, as you say, your knowledge of it as such, that you took up with Mr. Elman your dissatisfaction with Mr. Hermann? A. Yes.

Q. That is true. Mr. Bercut, when this document that has been called by various names and is labeled "Agreement," Plaintiff's Exhibit 11, signed by Peter Bercut and by Serge Hermann—when that document was prepared and submitted to Hermann for signature you had in your possession Plaintiff's Exhibit 2, consisting of the original contract, the supplemental agreement, and the assignment from Mr. Hermann to Park, Benziger & Company, didn't you? A. Yes.

Q. Is there anything in this instrument, Plaintiff's Exhibit 11, that you contend refers to Park, Benziger & Company? A. No.

Q. This instrument was prepared by whom, this agreement Plaintiff's Exhibit 11? We have termed it "release," and the other side has termed it "cancellation." By whom was it prepared?

(Testimony of Jean Bercut.)

A. Mr. Evans.

Q. Mr. Evans, your accountant and book-keeper? A. Yes, sir.

Q. At whose direction?

A. Well, mostly his own. He heard the conversation. He received instruction by Elman, by Hermann, and by ourselves during the preceding meeting on the 26th, and he made this thing accordingly.

Q. He received instructions, you say, by Elman? A. Yes, sir.

Q. Was your employee taking instructions from Elman at that time? A. Yes, sir.

Q. Did you or Peter give him any instructions for the [311] preparation of it?

A. Yes, sir.

Q. Did you or Peter tell him what was to go in it?

A. According to what we had agreed in those talks.

Q. Did you or Peter tell him who were to be the parties to this agreement?

A. Well, Mr. Evans was present at all of these talks, and he—

Mr. Bourquin: I move that the answer be stricken as not responsive.

The Court: It may go out. Read the question.

(Question read.)

(Testimony of Jean Bercut.)

A. It wasn't—no further instruction to Evans except those that took place at the meeting.

Mr. Bourquin: I will ask that the answer go out as not responsive.

The Court: It is not responsive. Answer as directly as you can, and then if you wish to explain your answer you may. The answer will go out. Read the question again.

(Question reread.)

A. No.

The Court: Now, if there is anything you wish to explain, you may.

The Witness: Yes. The way it went, Evans was instructed by all of us that the cancellation of the contract that we made should be ready for the next morning. That is the last thing we said when we quit that conference.

Mr. Bourquin: Q. Let us ascertain who did tell Mr. Evans the parties to the agreement he was to prepare.

A. He had full knowledge of the parties involved.

Mr. Bourquin: I will move that that be stricken as not responsive. [312]

The Court: It may go out. Read the question.
(Question read.)

The Court: Q. Was there anything said about that?

A. There was nothing further said. My brother didn't stay after that conference to in-

(Testimony of Jean Bercut.)

struct Mr. Evans anything further. We all left at that time. All Evans received, he received at that conference. I know I didn't stay one second later. I went out and took them to their hotel.

Q. Did anybody say, "Mr. Evans, prepare a cancellation of the contract"? A. Yes.

Q. Who said that?

A. Peter Bercut instructed him first, Mr. Hermann agreed, Mr. Elman agreed, and everybody did.

Q. You say Mr. Elman agreed?

A. Yes, he did agree.

Q. What did he say?

A. He said, "That is o.k. If you people aren't satisfied, you have no confidence in us, the way we do, you can have it. I will return your contract and it is over with."

Q. Do you wish to tell the jury that at this conference at which Mr. Elman was present, Mr. Pierre Bercut was present, you were present, Mr. Evans was present— A. Yes.

Q. Was anybody else present?

A. Hermann.

Q. Mr. Hermann was present.

A. And Elman.

Q. Mr. Hermann was there? A. Yes.

Q. He heard what was said? A. Oh, yes.

Q. And Mr. Peter Bercut said, "Prepare a cancellation of the contract"? A. Yes.

Q. And Mr. Elman acquiesced?

(Testimony of Jean Bercut.)

A. He agreed, sure.

Q. Was anything further said about it?

A. No, we left.

Mr. Bourquin: Q. The day this instrument, Plaintiff's Exhibit 11, the agreement, was presented to Mr. Hermann for [313] signature did you drive Mr. Elman to the plant that morning?

A. Yes, sir. Yes, sir; I drove both of them down. I picked them up at their hotel and brought them down to the Merchants.

Q. To the what?

A. To the office of the Merchants.

Q. Who was there when you arrived?

A. Evans and Peter Bercut were there.

Q. Evans and Peter Bercut? A. Yes.

Q. When you went in did you find this agreement, Plaintiff's Exhibit 11, had been prepared?

A. Yes, sir.

Q. It was there with Peter Bercut and Mr. Evans, was it?

A. Yes, sir.

Q. I understand you to say that Mr. Elman told you it was perfectly agreeable with him for you to cancel the contract?

A. Yes, sir.

Q. With Mr. Hermann, or did he mean to blow up his contract, the contract of his firm, Park, Benziger & Company?

Mr. Naus: One moment. Objected to as call-

(Testimony of Jean Bercut.)

ing for the conclusion of the witness as to what Elman meant.

The Court: Sustained.

Mr. Bourquin: I will reframe the question.

Q. Did Mr. Elman state—do you want to be understood as saying that Mr. Elman told you to prepare a cancellation of the agreement with his company, Park, Benziger & Company?

A. No.

Q. He was perfectly willing that Mr. Hermann be eliminated from the transaction, was he?

A. He was perfectly happy to be eliminated himself. He returned me his contract.

Q. Why didn't you put the company's name in that if he was?

A. We had no business with Elman—I mean with Park, Benziger at the time.

Q. Was that the agreement? Do you want to be understood that [314] that was agreed on the 26th, the day before Hermann signed the instrument? It was agreed by Elman he was perfectly willing to surrender his own company's rights in the matter?

A. He did surrender them. He gave them to me.

Q. Did you agree there an instrument would be prepared, an agreement would be prepared for signature?

A. Between Park, Benziger and us?

Q. Did you agree on the 26th that this Plain-

(Testimony of Jean Bercut.)

tiff's Exhibit 11 would be prepared and be signed?

A. Yes.

Q. Did you agree that it would be signed the next day?

A. Yes.

Q. At the offices? A. Yes.

Q. You made that agreement at your meeting of April 26, did you?

A. Correct; that is right.

Q. Will you tell us why you could not wait for Mr. Elman to come in the office on the 27th to give you the contract if you attached importance to its possession?

A. It was this way on this contract: He looked in his pocket, as I told you previously, and he looked all over, and he said, "I am returning you the contract. We are through." He looked through his pockets; he didn't find any contract. He said, "I must have left it in my room. You come up with me and I will give you the contract."

I went up with him and he returned me that contract.

Q. Were you in a hurry to get it?

A. Not in any more hurry than doing any other thing. He promised to give it to us; that is all.

Q. Did you ask Mr. Elman to sign this agreement, Plaintiff's Exhibit 11? A. No.

Q. You did not ask him to sign it?

A. No. [315]

Q. How long have you been in business, Mr. Bercut?

(Testimony of Jean Bercut.)

A. Thirty years.

Q. How many enterprises have you been connected with?

A. Many.

Q. How many?

A. Well, I would say the meat business, the hide business, the wine business, the real estate business.

Q. Have you executed contracts for your own business? A. Yes.

Q. Many? A. Many.

Q. Many, many?

A. Oh, yes. I never had any trouble with any of them.

Q. Will you give us, please, any reason that you can that this agreement which you characterize here as a termination of your relations with Park, Benziger was prepared and executed between Bercut Brothers, Serge Hermann, and no one else? You prepared it. A. Yes.

The Court: Read the question.

(Question read.)

A. Yes, that was between Serge Hermann and ourselves.

Mr. Bourquin: Q. Well, I am taking your view of the matter that you wanted to or you believed you were also severing your relations with Park, Benziger. What is the reason that the agreement was limited to Bercut Brothers and Serge Hermann?

(Testimony of Jean Bercut.)

A. We didn't think we had any relation at all with Park, Benziger on that contract.

Q. Why did you take up the dissatisfaction with Hermann with Elman, Park, Benziger's man, if you did not believe you had anything to do with them on that contract?

A. Why did I take it up with him?

Q. Yes.

A. Because Elman, to our knowledge, was their customer. We sold them—we offered some wine to Hermann, he sold it to [316] Park, Benziger. We understood also Park, Benziger was going to have this wine.

Q. Did you know then of the assignment to Park, Benziger when you caused the plaintiff's Exhibit 11 to be prepared?

A. We had to find out during our conversation that Hermann became partners with Elman—with what you call it, Park, Benziger—Park, Benziger, you call it?

Q. For our record to be clear, I want to put the question again: Did you know when you caused the Plaintiff's Exhibit 11 to be prepared—

A. Yes.

Q. —did you know then of the existence of the assignment?

A. Yes.

Q. Of the contract of Park, Benziger?

A. We found out that day.

Q. You knew it then? A. Yes.

(Testimony of Jean Bercut.)

Q. You knew it when the instrument was presented to Serge Hermann for signature?

A. Yes.

Q. On the subject of that contract itself, Plaintiff's Exhibit 2, did Mr. Elman ask you to return it to him?

A. This contract? Yes, three or four days later, yes. He changed his mind three or four days later.

Q. Three or four days later? A. Yes.

Q. Three or four days later would mean after April 27.

A. Yes.

Q. Did you receive the formal demand prepared by Mr. Breslauer for that two days later, on April 29? A. Yes.

Q. Did you receive Mr. Breslauer's oral communication to you on April 28, one day after you mentioned seeking the document?

A. Oral conversation, no; in writing.

Q. Did your brother Peter Bercut tell you that Mr. Breslauer called and wanted it and he told him you had it? A. No. [317]

Q. He did not tell you?

A. He didn't tell me that.

Q. Did your secretary or the girl in your office give you any messages from Mr. Breslauer on the 28th or 29th prior to the service upon you of the formal demand which is here, Plaintiff's Exhibit 8?

(Testimony of Jean Bercut.)

A. Yes, I received that notice.

Q. Prior to that being served upon you on the 29th, is that correct?

A. What is the date of this thing?

Q. It is dated the 29th.

The Court: What is the question?

Mr. Bourquin: I broke my own question, your Honor. If I may put it again.

Q. When was that demand that you hold in your hand, Plaintiff's Exhibit 8, served upon you?

A. It was left in another room in the butcher shop. I found it in the butcher shop. It wasn't delivered personally to me. It was left in the butcher shop.

Q. Weren't you personally served?

A. It was left in the butcher shop.

Q. No one gave it to you personally?

A. No—my cashier give it to me.

Q. When?

A. She said, "Those papers were left here for you."

Q. When did she give it to you?

A. I don't know how many days after this 27th. I wouldn't know that.

Q. You are sure of that? A. Yes.

Q. Did you keep any record of that? Do you keep any records down in your place?

A. Not very much. We are busy with a lot of customers.

Q. You are not very much on records, are you?

(Testimony of Jean Bercut.)

A. No.

Q. You didn't keep any record of your receipt of that communication formal in its terms, did you?

A. No.

Q. Now, sir, did you on April 28 receive any messages from your [318] secretary or your phone girl from Mr. Breslauer?

A. No.

Q. Did you receive any messages or did she give you any calls from Mr. Breslauer or to call Mr. Breslauer on April 29?

A. No.

Q. The second day after the breakup of the 27th?

A. No.

Q. You are positive of that?

A. Yes; I didn't receive anything like that.

Q. Tell us, then, as nearly as you will—we want you to be definite—when did you first receive any communication seeking the return of that contract?

A. I received a telephone call from Hermann—from Elman at my house in the evening.

Q. At your house of an evening?

A. On an evening, yes.

Q. When?

A. I don't know whether it was the day after or two days later. I don't know exactly the night it was, but he called me up and told me he wanted his contract back.

Q. Let's see. You say that was a day after what date?

A. Or two days, it might have been; I don't remember.

(Testimony of Jean Bercut.)

Q. Or two days after what date?

A. The 27th.

Q. We are coming back now to the 27th. You say it was a day or two days after?

A. That Elman called me up.

Q. That Elman asked you for it?

A. Yes.

Q. What did you tell him?

A. I told him I didn't know why he wanted that contract. He give it to me; it was our property.

Q. Did you refuse it?

A. Yes, sir, I refused, sure.

Q. What did you expect to accomplish by withholding the physical possession of the contract?

Mr. Naus: Objected to as argumentative.

The Court: Sustained.

A. It was my property.

Mr. Naus: One moment, please. [319]

Mr. Bourquin: Q. You did know, didn't you, that there were other writings in existence evidencing your arrangements with Park, Benziger? You knew of the correspondence, didn't you? You knew of the correspondence between Park, Benziger and Bercut Brothers?

A. Yes, I knew the correspondence, but that was my property, that piece of paper. He give it to us in front of everybody. He promised to give it to us.

Q. Who was that in front of?

(Testimony of Jean Bercut.)

A. In front of Hermann, Peter Bercut, Evans and myself.

Q. I thought he gave it to you at the hotel.

A. He did, but he promised to give it to me.

Mr. Naus: He promised in front of everybody.

Mr. Bourquin: I would like the witness to testify.

Mr. Naus: The witness did testify to that. Objected to as attempting to distort the answer of the witness.

The Court: I do not think there is any necessity for this talk at all. Now, is there a question pending?

Mr. Bourquin: Q. You did receive it from Mr. Elman at the hotel, didn't you? A. Yes.

Q. What time of day? Early in the afternoon?

A. As soon as we left, the 26th day—the conference—I took these two gentlemen to the hotel, and the first thing I walked up with Elman to his room and he looked for this thing through his papers and delivered it to me right there and then.

Q. What time of day, do you recall?

A. That I wouldn't know. I wouldn't know exactly the time.

Q. Well, you saw him again that same day, didn't you?

A. Yes.

Q. You called for him again that same day?

A. Yes, I called for him, yes. [320]

Q. You called for him at the end of the afternoon, didn't you? You called for him at the end of that same afternoon, didn't you?

(Testimony of Jean Bercut.)

A. On the end of the same afternoon.

Q. Yes, and you called to take him to your home for dinner?

A. That is right.

Q. Is that correct? A. That is right.

Q. And you did take him? A. Yes.

Q. Mr. Bercut, who was that buyer that called you from the Palace Hotel and gave you the tale about Hermann?

A. I have got his name.

The Court: We will have a recess for five minutes. The jury will remember the admonition heretofore given. [321]

(Recess:)

The Court: The jurors are present; you may proceed, Mr. Bourquin.

Mr. Bourquin: Q. Mr. Bercut, you were going to give us the name of that man who told you the tale about Hermann.

A. Yes. The name of the firm is St. James Wines, Inc., of New York. I have here the name, Hugo Jacobi.

Q. Who was he?

A. A total stranger to me.

Q. What was his business?

A. Wine business.

Q. Did he want to buy wine from you?

A. No.

Q. Are you sure? Did he say he did?

(Testimony of Jean Bercut.)

A. He didn't say he did. He knew me—I mean he got the information from Hermann. He find out about me through Hermann.

Q. Let me ask you if on the deposition that you gave in this matter on September 2nd you testified, and I will read to you page 39:

“Q. Mr. Breslauer: Was Mr. Hermann here in San Francisco at the time?

A. At the time he had just left this gentleman that I mentioned. Oh, yes, now you put me back to what I want to think—what I want to say. Hermann said to this gentleman, he says, ‘I’m waiting for a representative of Park-Benziger, and if this man does not arrive here in three days I will show you these wines and I will sell them to you.’ This gentleman was out here to buy wine. He was a Vermouth manufacturer in New York. And he said to me, ‘If those wines are good, why, I will naturally be interested, but I won’t do business through Hermann—absolutely not. If this Park-Benziger representative he talked about don’t arrive, why, I want to know a few things about this wine, what it is, but,’ he said, ‘I am not going to [322] purchase them through Hermann.’ And I said, ‘As far as I know, I don’t think we can do any business, because Hermann wants these wines. We have a contract with him. However, I’m going to follow the thing up.’ ”

(Testimony of Jean Bercut.)

Did you testify so on your deposition?

A. Yes.

Q. Does that refresh your recollection that the man that you say gave you this information wanted to buy wine?

A. I never sold him any wine. He left here, he left the name of his man who represented him here in San Francisco, and if we want to do business separately, he was leaving for Los Angeles.

Q. But he was wanting to buy wine?

A. He was a wine buyer, yes, but he didn't want to buy wine from Hermann.

Q. But he wanted to buy your wine if he could, didn't he?

A. Well, we didn't enter into business details about it. He left with the knowledge that there was a contract between us and Hermann; therefore, there was no wine deal at all. He knew about that contract because Hermann showed him the contract, he knew every detail of that contract and everything, how many bottles of wine we had, the proportion of the wines that we had, he knew everything; he knew the contents of the contract entirely.

Q. Did he want to buy wine? Did he want to buy that wine from you, that man you referred to?

A. He couldn't buy the wine from me because I had a contract with Hermann.

Q. Did he tell you that he wanted to buy the wine from you?

A. He said, "Some day if you are free to do

(Testimony of Jean Bercut.)

business, if you contact my man in San Francisco and offer him some wine," he said, "I am in the market to buy wine."

Q. He did express a desire to buy wine, did he, or some of the wine?

A. He said, as I told you, that he left it to the salesman, to his agent here in San Francisco, to do business if we were [323] sometime or other in a position to do business.

Q. When you came away from that man, Mr. Bercut, what did you know, was he wanting to buy wine, or was he not interested in buying your wine?

A. Well, I told you exactly what happened. This man was a good friend of Mr. Feldheim, and he got interested in saving the day for me, telling me that Hermann was not the man to do business with; that is how the connection came. Mr. Feldheim is right here now. He knew Mr. Jacobi and he got interested in me because he knew all about the Feldheim deal and how Feldheim got bunked and robbed and so on by Hermann.

Q. Did he say to you, "If your wines are good I will be interested"?

A. He simply said, "Sometime if you are in a position to do business let my agent know about it."

Q. Did he say what I read to you, "If your wines are good, why, naturally, I'll be interested"; did he say that to you?

A. Yes, he will be interested, yes.

Q. Yes.

(Testimony of Jean Bercut.)

A. But the sole reason he told me that was because he was a friend of Feldheym.

Q. Whom did you say that man represented?

A. That man represented his own firm.

Q. What was the name of his firm?

A. I got the label here. It says "St. James Wines, Inc.," of New York.

Q. Is that the card he gave you at the time, the card that you produced there? A. Yes.

Mr. Bourquin: I will ask it be marked in evidence. May I have a look at it?

A. That is the card.

The Court: Do you wish the card and the label as exhibits?

Mr. Bourquin: Yes. I will ask it be marked as an exhibit. Let me see the label. I ask they both be marked. [324]

(The label and business card referred to were marked Plaintiff's Exhibit 16.)

Mr. Bourquin: Q. Now, Mr. Bercut, let me ask you if on the taking of your deposition you did not on the subject we are now on testify as follows, pages 40 and 41, counsel—to pick up the text first on page 40, to questions asked by Mr. Breslauer:

"Was Mr. Elman, of Park, Benziger & Co., in San Francisco at that time?

"A. Yes—no—wait a minute; excuse me now. Now, Elman came the next day or a couple of days later. That is, the first day that I was there, Elman didn't arrive yet.

(Testimony of Jean Bercut.)

“Q. This conversation with the man at the Palace Hotel—by the way, what was his name?

“The Witness (To Mr. Naus): Shall I give it?

“Mr. Naus: You must.

“The Witness: I must? Well, he told me not to.

“Mr. Naus: It is all right. You are under oath now and you are in court. Go ahead and answer it.

“A. Blum.

“Mr. Breslauer: Q. The first name?

“A. Blum.

“Q. His first name, do you know?

“A. No. He was a manufacturer of Vermuth in New York.

“Q. B-l-u-m? A. Yes.

“Q. Mr. Blum. The conversation with Mr. Blum and the conversation with Mr. Feldheim took place a day or so before Mr. Elman arrived? Is that right? A. Yes.”

Did you give that testimony? A. Yes.

Q. On the taking of your deposition?

A. Yes.

Q. Was it true? A. Yes. [325]

Q. Is the truth that when you talked to the man at the Palace Hotel who told you the tale about Hermann that that was before Mr. Elman arrived in San Francisco?

A. That's right.

(Testimony of Jean Bercut.)

Q. Now, tell us what you say the man who gave you the story, what his name was; was it Jacobi, or was it not?

A. It was Jacobi.

Q. It was Jacobi.

A. I got his card.

Q. Why did you tell us on the taking of the deposition that he was a manufacturer of vermuth in New York by the name of Blum?

A. The thing was I lost the card and label and everything else and I thought his name was Blum up until I checked over all the records and everything else and I found his name was Jacobi.

Q. When did you check to find his name was not Blum but it was Jacobi?

A. After I talked again to Feldheim and after I find my records, my cards and everything else.

Q. When did you find the record that would justify your correction of the name from Blum to Jacobi?

A. When did I find it?

Q. When did you find it?

A. Between the last trial and this trial.

Q. Between the last trial and this trial?

A. Yes.

Q. Let me ask you, Mr. Bercut, do you know a man by the name of Henri, as the French spell it, Behar?

A. Yes.

Q. Who is Henri Behar?

(Testimony of Jean Bercut.)

A. Henri Behar, he is a wine merchant from New York.

Q. Whom does he represent?

A. He represents the Vintage Wines of New York.

Q. The Vintage Wines of New York. Did you make any commitment for the sale of the wine covered in this contract to the man that you talked to in the Palace Hotel and who told you the tale about Hermann?

A. Repeat that? [326]

The Court: Read the question.

(Question read.)

The Witness: If I offer him the wine?

The Court: Did you make any commitment?

A. No, no.

Mr. Bourquin: Q. Are you sure?

A. No.

Q. Wasn't the man that you referred to here, Henri Behar, whom you saw at the Palace Hotel at the time you say you received that tale about Mr. Hermann?

A. Mr. Behar came—

Q. Answer "Yes" or "No." A. No, no.

Q. Didn't you sell these same wines to Mr. Behar and didn't he pay you \$10 a case—

Mr. Naus: One moment.

The Witness: A. No.

Mr. Naus: I object to the allusion to \$10 a case on the part of counsel as misconduct, and assign it as misconduct, and ask the court to give an ad-

(Testimony of Jean Bercut.)

monition with respect to it. Further, I object to the question as an attempt to renew the effort to go into sales of these wines subsequent to April 27, 1943; I object to it on all the grounds previously stated, and I might add, if the Court please, that you probably may recall that in the former trial there was a reference to some five carloads or ten carloads of wines, I forget at the moment the number, at the other trial, of vintage wines that went up to Idaho, and they are also included within that schedule that is marked for identification, so if there is an attempt now under the guise of cross-examination to get away from the conversation at the Palace Hotel, and ask about sales of wines to someone out of the same lot since, I renew my objections heretofore made.

Mr. Bourquin: May I be heard, your Honor?

The Court: Yes. [327]

Mr. Bourquin: Your Honor please, preliminarily, this witness testified that at the time of the break-up of the contract he was ready and offering to sell Park-Benziger all the wines they wanted. He also said that he was ready to sell them to them at the same prices fixed by the contract. Now, we pursue the examination, to which Mr. Naus complains, your Honor, believing we are entitled to show the real reason and the real motive behind the events of April 26th and 27th which they claim cancelled their arrangement with Park-Benziger, to impeach the witness' reason given here, and to

(Testimony of Jean Bercut.)

show the real reason and motive. I think we are entitled to it. I want to add further to that, your Honor, I want to show in that connection that at the time Mr. Elman was in San Francisco, and at the time of the events that transpired on the 26th and the 27th these people then knew they could dispose of this wine elsewhere to much greater advantage, and that certainly is motive, I would say, in our theory of the case, of course certainly is motive for the events which transpired on the 26th and 27th.

Mr. Naus: I would like to add to the objection previously made that in connection with the assignment of misconduct and request for admonition, I would like to add further that all of the documents relating to Mr. Henri Behar, the bills of lading, invoices, and everything, they are in the schedule, here, and counsel for the plaintiff, other than Mr. Bourquin, who came into the present trial, have been fully informed about it, and that there is no basis whatever, in truth or in fact, for any suggestion that any wines were ever sold for \$10. The implication in the question is based upon a falsehood.

The Court: I don't see why you are injecting that \$10 proposition here. Is it an attempt to show the wines were sold [328] for that figure for the purpose of proving any loss?

Mr. Bourquin: Not for that purpose, at all. It may be, as Mr. Naus suggests, conflicting with the

(Testimony of Jean Bercut.)

ruling of your Honor on the question of damages, but, nevertheless, believing we are entitled to show whether it is \$10 or \$8.50, or what, merely that these people knew at the time they went into the meeting on April 26th with Mr. Elman and Mr. Hermann, that the market on these wines was rising, and had risen, and they could and did sell for prices much above the contract prices; that that furnished the motive.

The Court: Why not eliminate the figure of \$10 in that question?

Mr. Bourquin: If I could merely reduce it to a price above the contract price I would, your Honor.

The Court: Yes. I think I will permit the question, if you will just eliminate that portion. The objection of Mr. Naus is overruled. I do not think there is any misconduct here. You may proceed.

Mr. Bourquin: Q. Mr. Bercut, didn't you sell the wines covered by the contract in Plaintiff's Exhibit 2 to the concern represented by the man at the Palace Hotel that you say gave you the tale about Hermann at prices in excess of the contract price? A. No.

Mr. Naus: You mean all the wines, or some?

Mr. Bourquin: I will say most of them.

The Witness: A. No.

Q. I will say 85 per cent of them.

A. No.

(Testimony of Jean Bercut.)

Q. Let me ask you this: When you went into the meeting on April 26th with Mr. Elman and Mr. Hermann, didn't you know that those wines then would command a better price than was agreed upon in [329] the contract made January 29th?

A. No.

Q. Didn't you sell Mr. Harry Rathjen, who testified here yesterday, some of the wines, some wines covered by the contract here in issue, at a price in excess of the contract price?

Mr. Naus: Objected to on all the grounds previously stated; further, that the question is unlimited in its form and not confined to any attempt to sell or to any sale before April 27, 1943.

Mr. Bourquin: Mr. Rathjen testified he was offered those wines about April 20th, or before.

Mr. Naus: I know, but your question is confined to sales. Mr. Rathjen didn't testify to any sales. [330]

The Court: Objection overruled.

(Question read.)

A. Yes, at a later date, much later date; in May or sometime.

Mr. Bourquin: Q. In May? A. Yes.

Q. Did you sell any of the wines covered by the contract to the Spreckels Market prior to April 27th? A. No, sir, absolutely not.

Mr. Bourquin: That is all the cross-examination, your Honor.

Mr. Naus: No questions.

W. G. EVANS,

Called for the defendants. Sworn.

The Clerk: What is your full name?

A. W. G. Evans.

The Clerk: What is your address?

A. 2271 26th Avenue.

Direct Examination

Mr. Naus: Q. Mr. Evans, you are connected in business with the defendants, are you?

A. Yes, sir.

Q. And have been for how many years?

A. Twenty years.

Q. In what capacity?

A. Various capacities in the twenty years.

Q. State generally the nature of your connection.

A. General manager of the Merchants Ice & Cold Storage Company.

Q. The Merchants Ice & Cold Storage Company is simply one of many activities, is it not?

A. Of the Bercut brothers, yes.

Q. When you say "Bercut brothers," you mean Peter and Henri rather than Peter and Jean, don't you, of the Merchants Ice?

A. I mean Bercut brothers, the three of them.

Q. The three of them together. The Bercut brothers took over the majority control of Merchants Ice in January 1941 and took over the management in February 1941, isn't that right?

A. February 1, 1941.

(Testimony of W. G. Evans.)

Q. So you have been general manager of the Merchants Ice only since the early part of February 1941? A. That is right.

Q. What other activities, major activities, have you been connected with in Bercut Brothers as an associate or as an employee?

A. I have attended to the financial matters in most of the enterprises.

Q. The Grant Market on Market Street?

A. Yes, sir.

Q. What else? State specifically.

A. Bercut-Richards Packing Company, Sacramento; English Estate Company; Markets [331] Investment Company; Bercut Bros.; P. & J. Cellars; Chateau Apartments; Celeste Apartments; Tiffany Apartments; 2166 Market Street; properties in Richmond; the Arco Apartments, 20th Avenue Apartments.

Q. Prior to this wine contract with Serge Hermann on January 29, 1943 and throughout the twenty years you had been with the Bercut Brothers, had they ever at any time been in any wine deal before? A. No, sir.

Q. Prior to this contract with Mr. Hermann on January 29, 1943, and in the twenty years over which your association and knowledge goes, had they ever at any time sold so much as a bottle of wine to anybody in the world?

A. Not to my knowledge.

Q. Beginning with February 1, 1941—I believe

(Testimony of W. G. Evans.)

you personally have had your office, the physical space for those various things you attend to, down at the Merchants Ice & Cold Storage Company?

A. Yes, sir.

Q. Among your other activities you act as general manager of the Merchants Ice & Cold Storage Company, beginning with the change out of the old management and the coming in of the Bercut management in February 1941, is that correct?

A. Yes, sir.

Q. Now, you have been named as being among those present at the conferences of April 26 and 27, 1943. You were present, of course, weren't you?

A. Yes, sir.

Q. As has been indicated in the testimony here, on April 26 the first of what might be called a series of conferences occurred, which was participated in by Mr. Elman but not by Mr. Hermann. Now, addressing your answer to that phase of the meetings on that day, tell us what was said and by whom as best you can while Hermann was still out of the room and Mr. Elman was still in there.

A. The meeting took place on I think it was a [332] Monday at ten o'clock in the morning, and the Bercuts had decided to ask Mr. Elman in first at the meeting and asked Mr. Hermann to wait until a little later.

Mr. Elman came in the office, and Peter Bercut asked Mr. Elman, "What do you know about this man, Mr. Herman? How long have you known

(Testimony of W. G. Evans.)

him?" He said, "My brother Jean gets some very bad reports about Mr. Hermann. If Jean says he hasn't financial responsibility, I don't hardly think it would be good business for either you or us to do anything with Hermann. How long have you known Hermann?"

"Oh," he says, "some time, a short time."

"What kind of relations do you have? What is your setup between you fellows? Are you partners, or what is your relationship?"

Mr. Elman said, "Well, sort of. Mr. Hermann is in fifty-fifty. He is in for fifty per cent of the net profits."

"Yes," or something like that — "Yes. Well, the reports we get on Mr. Hermann, he is very bad. Apparently local people here in San Francisco have had some very bad experiences with Mr. Hermann."

"Well, I am surprised," Mr. Elman said. "I don't know much about him, but if you people aren't satisfied," Mr. Elman said, "if you people aren't satisfied with him I suppose we can call the thing off."

Mr. Peter Bercut said, "Well, let's call him in here. Jean, go and call Mr. Hermann in here and see what he has to say."

Then Mr. Hermann came in.

Q. Hermann was then called in?

A. Yes.

Q. From the time Mr. Hermann stepped in

(Testimony of W. G. Evans.)

the room, at that point, [333] tell us what was said, the substance of it, by the various persons from that time on.

A. Well, it was quite a stormy—I am not quite sure—my impression is that Mr. Elman went out of the room for a while.

Q. Are you sure one way or the other?

A. I am not sure, but I think I testified the last time that he did.

Q. Tell us the substance of what was said.

A. It was quite a stormy meeting there. Jean was quite vehement in stating Mr. Feldheim had had some very bad experiences with Mr. Hermann, that there was a car of wine went to New York.

Q. From California?

A. From California, belonging, I understand, to Mr. Feldheim, and Mr. Hermann sold it in New York, but that he claimed the wine was cloudy. Mr. Feldheim didn't get a penny out of that cloudy wine.

Then there was some other instance in Detroit where there was some wine belonging to Mr. Feldheim or some friend of his that they asked Mr. Hermann to sell, and there was no return from that sale either.

Jean was quite vehement about the financial responsibility of Mr. Hermann, and Mr. Hermann was rather indignant, too, because Mr. Hermann said that was a personal matter. If he had a busi-

(Testimony of W. G. Evans.)

ness dispute or a personal dispute, that was his personal affair and nothing to do with Jean.

The thing got quite fiery, and Mr. Peter Bercut interjected and said, "Jean, don't threaten. Let's not argue about this thing. There's a way out of it."

So I think Mr. Elman spoke up and said, "Yes, if you people aren't satisfied we'll cancel the whole thing," he said. "I will be out a few pennies for labels, the artist and one [334] thing and another," he said, "but if you people aren't satisfied, why, we'll call the whole thing off."

Then I think Mr. Peter Bercut instructed me to write a cancellation and have it ready for the next morning. It was agreed that the whole four would be down at the office at ten o'clock the next morning.

Q. Pardon me. Had you finished?

A. That is the best of my recollection.

Q. Through the years that you have been with the Bercut Brothers, the various ones, when it comes to drawing papers, carrying on correspondence and the like, are you the man personally who generally draws the papers, writes orders, and the like?

A. Most of it, yes.

Q. Were you given any instructions with respect to drawing some paper for them to sign pursuant to this conference the following morning?

A. Yes.

(Testimony of W. G. Evans.)

Q. Who, if anyone, said anything to you about that, or what, if anything, was said to you about that?

A. Well, merely said to write a cancellation of the contract.

Q. And they all left then, leaving you at your office?

A. Yes.

Q. All this took place in your personal office, your manager's office, at the Merchants Ice, did it?

A. Yes.

Q. So they all left on this occasion of the 26th, leaving you alone at the office?

A. That is right.

Q. Between that time and the following morning, when they reassembled, did you or not prepare a paper?

A. Yes, sir.

Q. This one that is marked Plaintiff's Exhibit 11 in this case (handing document to witness)?

A. Yes, sir.

Q. Did you draw that entirely yourself, or did you call in some lawyer to aid you?

A. I drew that up myself. [335]

Q. It is entirely your own drafting?

A. Yes. I may have gotten parts of it from somewhere else.

Mr. Bourquin: Will you read that last answer, Mr. Reporter.

(Answer read.)

Mr. Naus: Q. Where?

A. From some other agreements.

(Testimony of W. G. Evans.)

Q. You mean a paste-box and scissors deal, something like that?

A. No; I mean the phrases aren't mine.

Q. Where did you get them?

A. From another agreement, probably the same kind.

Q. In the office? A. Yes.

Q. Did you or not in drawing that attempt to state as best you could the substance of what you had listened to on April 26?

A. Yes.

Q. Did you attempt to change in any way the substance of what you had listened to on April 26?

A. No, my instructions were not to do that.

Q. On April 26 did anybody use the word "release"?

A. Absolutely not.

Q. On April 26 did anybody use the words "personal release"?

A. Positively not.

Q. On April 26 was the word "cancel" or "cancellation" or "cancelled" used? A. Often.

Q. By whom?

A. By Peter Bercut, by Mr. Elman, by Jean Bercut.

Q. Well, they all reassembled on the morning of April 27, did they, at the same office?

A. Yes.

(Testimony of W. G. Evans.)

Q. What happened and what was said on that occasion?

A. On that occasion when they came in, the papers were read, and there was enough, I think, for everybody to read them over.

Q. Were they read?

A. They were read. [336]

Q. By whom? A. By everybody.

Q. Mr. Elman and Mr. Hermann included?

A. Mr. Elman and Mr. Hermann included, Mr. Jean Bercut, Mr. Peter Bercut, and myself.

Q. Then what happened?

A. Mr. Hermann looked at them. He said, "Well, I don't know whether I should sign this or not." He said to Mr. Elman, "Where do you come out on this thing?"

Mr. Elman said, "That is all right. Go ahead and sign it. If they aren't satisfied with us, that is all right. I will be out a few pennies, but that is all in business. I will charge it to profit and loss or something like that. I will just forget about it."

Q. Was it signed?

A. Yes; Mr. Hermann signed it.

Q. After it was signed was it handed over to you or the Bercuts, left with you?

A. Left with me.

Q. After the signing and delivery of it, what, if anything, occurred among those present?

(Testimony of W. G. Evans.)

A. I think Peter Bercut said he had some business out of town somewhere, and I think Jean—

Q. Did he leave or did he stay?

A. I think both Jean and Peter Bercut left the room for a few minutes.

Q. What happened next?

A. Jean Bercut came back.

Q. Proceed.

A. I think I was kind of preoccupied with telephone calls. At least, one thing I remember after that, "For cash"—"You can have wine for cash."

Q. What was said about that and by whom?

A. Jean Bercut and Mr. Elman.

Q. Can you recall what was said or the substance of it?

A. I forget whether it was three cars, thirty cars, or "all the wine you want," but it was for cash; I remember that.

Q. After the signing and delivery of the paper there was some [337] talk among Mr. Elman, Mr. Hermann and Jean about shipping wine for cash, but you do not recall what quantity they were talking about; is that correct? A. No, sir.

Q. Is that correct?

A. That is correct, yes.

Mr. Naus: You may cross-examine.

Cross-Examination

Mr. Bourquin: Q. Mr. Evans, you are an employee of Bercut Brothers, are you?

A. Yes.

(Testimony of W. G. Evans.)

Q. And you have been for quite a few years?

A. Twenty years.

Q. And you give all of your time to that business of theirs, do you?

A. Their various enterprises.

Q. That is your occupation, your place with the Bercut Brothers; is that true?

A. Yes, sir.

Q. Now, sir, calling your attention to the meeting of April 26 that you testified about, did any question come up in the discussion that day as to whether or not the contract was assignable?

A. Yes.

Q. Who raised that question?

A. I think Peter Bercut did.

Q. Peter Bercut raised it. Tell us just what transpired in that respect about the question coming up whether the contract was assignable.

A. I think it was the impression of everybody that the contract was not assignable.

Q. Can you tell us what was said?

A. Peter Bercut asked Mr. Elman, and I think Mr. Hermann too, to show him where the word "assign" was in there anyway in the contract.

Q. Peter Bercut asked Mr. Elman and asked Mr. Hermann to show him where in the contract it said it could be assigned, did he?

A. No; where the word "assigned" was in there.

(Testimony of W. G. Evans.)

Q. Where the word "assigned" was in the contract?

A. Or "assignable." [338]

Q. In other words, he asked him where the word "assigned" appeared that would permit the contract to be assigned; is that what you understood?

A. I couldn't say that. The exact words Peter Bercut said was, "Show me where it says in there, in the contract, where they use the word 'assigned' anyway."

Q. What question was before the meeting? The question of whether or not it was assignable?

A. I think that is the first time that Mr. Elman told the Bercuts that there was an assignment.

Mr. Bourquin: I ask that be stricken and ask the witness be instructed to answer the question.

The Court: Denied.

Mr. Bourquin: Q. What was the question before the meeting? Was it the assignability of the contract?

The Court: How did this question come up as to the assignability of the contract? Who brought it up?

A. I think Peter Bercut. It came up in connection with, "What was the relations between Elman and Hermann?"

Q. Peter Bercut brought the question up, did he? A. Yes.

Q. Did Peter Bercut say or challenge the assignability of the contract?

(Testimony of W. G. Evans.)

A. I don't think it was necessary.

Q. Did he?

A. I think he did.

Q. In other words, Peter Bercut had voiced the contention that the contract was not assignable?

A. I think he did.

Q. The parties discussed that question, did they?

A. Not much.

Q. Not much? Did Mr. Elman have anything to say about it?

A. He was looking for the word there. I don't remember him saying anything.

Q. In any event, when the question was raised about Mr. Bercut the parties got out the contract, did they? A. My copy of it, [339] yes.

Q. And went over it looking for the word "assignment"?

A. That is right.

Q. Who did that?

A. All of them, I think—Mr. Peter Bercut, Mr. Hermann and Mr. Elman.

Q. All searching for the answer to the question that Mr. Peter Bercut raised, is that it?

A. Well, on the relationship, see?

Q. On that day, Mr. Evans, at that meeting of April 26, was the question of dissatisfaction with Park, Benziger raised, or was it merely a matter of dissatisfaction with Hermann?

A. I don't think the point was raised. There

(Testimony of W. G. Evans.)

was plenty of dissatisfaction with Hermann. I am positive of that.

Q. There was plenty of dissatisfaction with Hermann? A. Yes.

Q. But in the meeting of the 26th no dissatisfaction with Park, Benziger was uttered, was it?

A. Not to my knowledge.

Q. And you were present all through the meeting?

A. I think so—most of the time, yes.

Q. And until the parties retired?

A. What?

Q. Until they retired? Until Mr. Jean Bercut took Mr. Elman and drove him to his hotel?

A. Well, I have other things to do there. There is calls and one thing and another. I am preoccupied. I couldn't be positive about that.

Q. You say you prepared the instrument that you entitled "Agreement" that is marked Plaintiff's Exhibit 11 here?

A. Yes, sir.

Q. Exactly what instructions did you receive for its preparation?

A. Peter Bercut told me to prepare a cancellation of the contract.

Q. Peter Bercut told you? A. Yes.

Q. Did he tell you the parties to the agreement that he wanted [340] you to draw?

A. It wasn't necessary.

Q. Did he tell you? A. No.

(Testimony of W. G. Evans.)

Q. You have been drawing agreements for the Bercut Brothers for many years, haven't you?

A. Yes, sir.

Q. How many agreements would you say you have drawn for them?

A. A great many.

Q. A thousand?

A. Twenty years is a long time. The agreements are varied.

Q. You think it might be a thousand, Mr. Evans?

A. It would be purely guess work on my part.

Q. What would you say?

A. Well, there are so many contracts, releases, pretty nearly everything is a contract of some kind. It would be purely a guess on my part. It may not be right.

Q. Your best estimate, what would you say?

A. Are you talking about legal documents now?

Q. Agreements.

A. In the twenty years—let's see—that would be a hundred a month—a hundred a year—oh, no, not that many.

Q. How many would you say?

A. Fifty a year—not fifty a year either.

Mr. Naus: Maybe we can settle on a thousand, Mr. Bourquin.

The Witness: No, I would say maybe twelve a year, about a dozen a year.

Mr. Bourquin: Q. Maybe you have drawn

(Testimony of W. G. Evans.)

about two hundred and thirty, forty or fifty, something like that?

A. Something like that anyway.

Q. When you prepared the agreement who typed it?

A. I am not sure whether it was the girl at the Merchants or the girl at the market.

Q. Did you dictate it, or did you rough-draft it? [341]

A. No, I rough-draft everything. I am not good at dictating.

Q. You rough-drafted it? A. Yes.

Q. You gave it to the girl in rough draft to type?

A. I write them out.

Q. I beg your pardon?

A. I wrote it out.

Q. You wrote it out; that is what I meant.

A. Yes.

Q. When did you receive it from the typist?

A. I think she had it on my desk the next morning. I got down about eight-thirty.

Q. Did you look it over? A. Yes.

Q. Did you make any changes in it?

A. No.

Q. Who approved it of your employers?

A. Peter Bercut, I think.

Q. When he came in you showed it to him?

A. Yes.

Q. He read it? A. Yes.

(Testimony of W. G. Evans.)

Q. Did he ask any changes in it?

A. No, sir, he approved it.

Q. He did not make any changes in it?

A. He approved it.

Q. So the way you prepared it and received it from the typist and he read it and approved it is the way it was when Mr. Hermann signed it; is that true? A. That is right.

Q. By the way, who signed it first, Mr. Peter Bercut or Mr. Hermann?

The Court: Show him the document.

The Witness: It is my impression that Peter Bercut had signed first. Yes, that is right.

Mr. Bourquin: Q. When did he sign; can you tell us? A. That morning.

Q. When? Before the arrival of the parties or after the arrival of the parties?

A. I couldn't say.

Q. You couldn't say?

A. No, sir, I couldn't. [342]

The Court: Q. Did he sign it before Hermann signed it? A. I think he did.

Mr. Bourquin: Q. Before Mr. Hermann signed it had it been shown to Mr. Elman?

A. Yes, sir.

Q. Elman looked at it and read it?

A. Yes, sir.

Q. Gave it to Hermann and told Hermann it was perfectly all right for Hermann to sign it?

(Testimony of W. G. Evans.)

A. Yes, Mr. Hermann had a copy himself.

Q. Did you know when you prepared that agreement who Mr. Elman represented?

A. When I drew the agreement?

Q. Yes. A. Yes, sir.

Q. Who? A. Park, Benziger.

Q. Park, Benziger & Company? A. Yes.

Q. There was a note—unless I do an injustice that I do not mean—in the examination by the defendants' counsel of you, a note of, I thought, not excuse but explanation for the form of the document, that you are not a lawyer. You are not a lawyer, are you, Mr. Evans? A. No, sir.

Q. Did the Bercut Brothers have any lawyers at that time?

A. Oh, yes, I think so.

Q. They had lawyers at that time and before?

A. Before.

Q. They have had legal problems, questions that they called upon lawyers for? A. Naturally.

Q. Who were their lawyers at that time?

A. Let's see. I think they had Mr. Brownstone.

Q. A very good lawyer, is he?

Mr. Brownstone: Thank you.

Mr. Bourquin: I didn't see you here. I guess he is. A. Yes.

Q. Did you sometimes in the course of your

(Testimony of W. G. Evans.)

business or the [343] preparation of agreements call up the lawyers of Mr. Bercut?

A. Oh, yes, quite often.

Q. On this occasion you say you did not?

A. No, I didn't in this case, no.

Q. Any reason for not consulting the lawyers at this time?

A. No. It was a simple cancellation. It wasn't much to that.

Q. A simple cancellation? A. Yes.

Q. Why didn't you put Park, Benziger in there, Mr. Evans?

A. We had no contract with Park, Benziger.

Q. You did not happen to go with Mr. Jean Bercut when he procured the contract from Mr. Elman the day before, did you?

A. No, sir; I got plenty to do in Merchants Ice.

Q. Did Jean Bercut ever show you that contract? A. No.

Q. Did he ever say anything to you about it?

A. No.

Q. Did you know that the contract had been assigned to Park, Benziger?

A. Not until Mr. Elman said so that morning.

Q. Which morning?

A. The morning of the 26th.

Q. That was before you prepared the agreement which you hold in your hand, Plaintiff's Exhibit 11? A. That is right.

(Testimony of W. G. Evans.)

The Court: We will be in recess until two o'clock. The jurors will please remember the admonition I have given you heretofore. The jury may now retire.

(Thereupon a recess was taken until 2:00 p.m. this date.) [344]

Afternoon Session, Friday, March 17, 1943,
2:00 p.m.

The Court: The jurors are present. You may proceed.

Mr. Bourquin: We have no further questions of Mr. Evans.

PIERRE BER CUT

one of the defendants, called in his own behalf; sworn.

The Clerk: Q. Your name is Pierre Bercut?

A. Peter Bercut, also known as Pierre Bercut.

Direct Examination

Mr. Naus: Q. And you are one of the defendants in this case? A. Yes.

Q. Mr. Bercut, there has been a reference in the testimony here to Merchants Ice & Cold Storage Company. Now, you and one or more of your brothers acquired a majority ownership in the vot-

(Testimony of Pierre Bercut.)

ing stock in that company back in January, 1941, didn't you? A. Yes.

Q. Then shortly following that you assumed the presidency of Merchants Ice and took over the management of it? A. Yes.

Q. And appointed Mr. Evans general manager of Merchants Ice at that time? A. Yes.

Q. Did you and your brother Jean first acquire this stock of wine before or after you took over that management of Merchants?

A. After.

Q. At the time you took over the management of Merchants Ice you first fired out the old management, did you? A. Yes.

Q. After taking it over did you or not have considerable idle or vacant space down at Merchants Ice?

A. Very much so. It was a place well suited for wine, but there was no wine in it.

Q. Prior to that time had you ever dealt in wine? A. No, sir. [345]

Q. Had you ever bought or sold wine before?

A. No, sir, outside of what I would use in my own family.

Q. Well, you would buy a glass or bottle for yourself? A. Yes.

Q. That is as far as it went, was it?

A. Correct.

Q. About how soon was it after you took over

(Testimony of Pierre Bercut.)

Merchants Ice that you and Jean started to acquire this stock of three hundred odd thousand bottles?

A. Within the first six months, I believe.

Q. I believe you acquired the wine in bulk or gallonage from Fruit Industries in the first place?

A. Not exactly. It was acquired that way, but it was that the Fruit Industries agreed to bottle it for us.

Q. You bought it in bulk and arranged with them and you supplied the bottles and arranged with them to bottle it and deliver it to you in bottles?

A. Yes.

Q. Then you laid it down in the Merchants Ice?

A. Yes, that is the only way I knew it.

Q. After laying it down, you and your brother Jean kept it under a fairly constant or even temperature from the time you acquired it until——

A. The engineer for Merchants Ice attended to that.

Q. At the time you and Serge Hermann signed this original contract of January 29, 1943, at the time you entered into that contract did you then know that if at any time thereafter you did not deliver the wine as called for by the contract that the buyer could not acquire it elsewhere?

A. I didn't have the least idea of that.

Q. Did anybody up to and including January 29th give you notice or warning or information that if you did not deliver that wine it could not be gotten somewhere else?

(Testimony of Pierre Bercut.)

A. No. Our deal was entirely between ourselves, and it did not go outside; I didn't go out and talk about it, or anything. I just kept that part of [346] our own business.

Q. How long before the signing of the contract on January 29, 1943 had it been that you first met Mr. Serge Hermann?

A. Only a few days before, probably. It all took place during one week, I believe.

Q. Up to, roughly, somewhere about a week before signing that contract he was an entire stranger to you, was he?

A. Yes; never met him before.

Q. Up to the time you negotiated and entered into the contract with him, the one on January 29, 1943, had you ever had any business or dealings with Park, Benziger & Co.?

A. No.

Q. You were mentioned as one of the persons present at the conferences of April 26th and 27th, 1943. You were present, of course, weren't you?

A. Yes.

Q. The testimony in this case indicates that the opening or beginning conference of April 26, 1943, was one in which Mr. Elman was included and Mr. Hermann was excluded. That is correct, isn't it?

A. Only for a little private questioning.

Q. In advance? A. Yes.

Q. Now, turning your attention and turning your answers to what occurred that morning in the conference before Mr. Hermann joined the confer-

(Testimony of Pierre Bercut.)

ence, tell us as best you can what was said, or the substance of what was said by those present.

A. You mean before Mr. Hermann came into the conversation?

Q. Yes.

A. I asked Mr. Elman, I believe I told him, I said, "How long do you know this man Hermann?" He said, "About six months; why?" I said, "We heard some very bad reports about the man, and I was wondering if you were aware of it." He said, "No. I only know him for six months. As far as I know he is all right." Something like that. Then I begin to tell [347] him what we heard through Jean, he made the report to me of what he had found out. Then he said, "I am very disappointed, I am very sorry it turned out to be that way." He says, "In that case I think there is only one thing to do, that is to cancel the whole thing." He said, "That is my opinion." He said, "I would be willing to do that." He says, "You know, my firm is not a wealthy firm, but they are honest, and if——" He said something in French that means that if you rub with dirt you will get dirty yourself, something, as near as I could translate it to English.

Q. Mr. Elman said that?

A. Yes; with difficulty. It was not very good French.

Q. But Mr. Elman speaks French and you speak French?

(Testimony of Pierre Bercut.)

A. I speak French, and I had told him, yes, that was the way I translated it. Then we suggested that we all go in and meet and talk over the whole thing in front of Hermann, let him know our findings.

Q. In this preliminary conference was anything said with respect to the nature of the relationship between Park-Benziger, on one side, and Serge Hermann, on the other?

A. That came up; I am not so sure that it was before or after Mr. Hermann was in the conversation.

Q. It did come up, either when Hermann was present or when he was absent? A. Yes.

Q. When it did come up what, if anything, was said at one or the other of those conferences about it?

A. Then I asked Mr. Elman what was his connection with this man.

Q. You asked Mr. Elman?

A. Yes. I said, "What is your connection?" They came together all the time, and Hermann introduced him to me as a representative of Park-Benziger with nothing, no other comment except he was going to help him to market the wine, or something of that kind, but I was not interested to find out [348] why they traveled together, that was none of my business. I sold the wine to Hermann and I felt—

(Testimony of Pierre Bercut.)

Q. I know, but was anything said as to the nature of the relationship between them?

A. No, they never told me that, but they consulted each other about what to do and what not to do.

Q. Stepping aside for a moment, before the conference of April 26th began you had met Mr. Elman the first time about how long before?

A. I believe it was almost a week.

Q. About a week before? A. Yes.

Q. Up to that time, of course, he was a stranger to you?

A. Yes. He was still a stranger, he never had any dealings with me. He and Hermann, Hermann took him—I opened the door to show him the cellars, and Hermann did all the talking. He showed him the bottles, and showed him the—and I probably drew the conclusion that he was selling the wine to him.

Q. At the first time you met Mr. Elman, and at every time after that you ever met him, up to and including April 27th, did you ever meet him alone? A. Never.

Q. Was or was not Mr. Hermann always with him? A. Would be together all the time.

Q. On every occasion when you met them the two were together?

A. Always two.

Q. As between the two of them, who did the talking?

A. Mr. Hermann was doing the business.

(Testimony of Pierre Bercut.)

Q. Well, Mr. Hermann did the talking as between he and Mr. Elman, did he?

A. Yes, he was doing some selling to him, I am sure.

Q. Going back to the conversation on April 26th, tell us what was said, the substance of what was said by those present, from the time that Mr. Hermann was called into the room, from that time on?

A. Well, Jean Bercut went on to give the details of [349] what he had found out. Shall I recite it, just the way I heard it there?

Q. Whatever you heard.

A. Exactly the same things. I recall Jean Bercut telling, accusing Hermann of some dealings with a firm named Chateau Montelena of San Francisco, or St. Helena, and that he had practically talked him out of his wine; in fact, he did have the wine shipped to him and agreed to pay for it on arrival, and when it arrived Hermann pleaded for more time to pay, and he gave him a trade acceptance, and the trade acceptance was not honored, and finally I find out why it was that Feldheym was out of his wine, and they had some letters saying the wine was perfect, and some correspondence, some of the correspondence that Hermann had acquired—had the wine in his possession and he said it was not so good. Then he talked about another deal in Detroit, I think, where this happened, at the same time, also, that the wine was

(Testimony of Pierre Bercut.)

going on the way to New York and Mr. Feldheim had confidence with Hermann at that time, and he sent him to dispose of another lot of wine, and that he didn't make any—

Q. Account of sale?

A. Account of sale of any kind, and also Mr. Feldheim, it was his position that he had to pay the people and that the wine was taken away, and those things, to those things Mr. Hermann did not deny, but he said it was his own business, it had nothing to do with us, and I called his attention that I didn't want to get into a mix-up of that kind, and at that time I asked Mr. Elman what was his connection, and he said, "Well, we have a deal and we are going to give him 50 per cent." I said, "If you have 50 per cent and I ship some wine and somebody is going to attach that wine, I will be the one who will be the loser. I said, "I think we should go and cancel that contract if [350] you are satisfied to do so."

Q. What did he say?

A. He said it was all right with him, and Mr. Elman said he, himself, was also satisfied. The reason the cancellation came up, we had a little difficulty before about the way the wine would be put up, and they told me—

Q. State what that was, that difficulty about putting up the wine.

A. Well, they were in the cellar—

Q. Who is "they"?

(Testimony of Pierre Bercut.)

A. Hermann and Elman, and they told me that I would have to take every bottle and polish it and clean it and wash it, and then put on a big label and put it in a silk paper.

Q. Silk tissue?

A. Silk tissue. I said I didn't know whether those things were available, and besides that my contract didn't call for those packing expenses. So he said, "Well, my dear Pierre, if you are not satisfied we will cancel." So I concluded, too, that they were in that mood and they were not happy with their deal, and I was satisfied to cancel. I didn't want to do business with people who were not satisfied.

Q. As a matter of fact, did you, on one side, and Mr. Elman on the other, ever come to any agreement whatever with respect to the washing of the bottles and wrapping them in tissue paper?

A. No; that was left in suspense. That is probably then what started the whole idea of the cancellation; that gave me an idea they were not happy with their deal.

Q. Going back to the conversation of April 26th, when everybody was present, you reached a point there, and I will ask you what, if anything, was done with respect to going ahead about the cancellation?

A. Well, we talked just on those lines, that there will be on account of the showing made, the credit

(Testimony of Pierre Bercut.)

and one thing another, that it was the best for all concerned to cancel the business. [351]

Q. Was anything said with respect to having a paper written up showing the cancellation?

A. No. I think that was the procedure that is done in a case where they don't go through with the contract.

Q. When the conference of April 26th broke up was any arrangement made for meeting again?

A. Yes.

Q. What was the arrangement?

A. The arrangement was that we would have a cancellation drawn up for them and if they would please come back and sign it, and we made the time and the place and we all were there on the job.

Q. What instructions, if any, were given to Mr. Evans, who was present, with respect to drawing the cancellation?

A. The only thing I told Mr. Evans, I said, "You heard what took place. You see what they want. They want a cancellation and I want a cancellation, draw one up." Mr. Evans had more experience than I have in these matters, and I always leave it to him to use his discretion to get it up, it is satisfactory for both sides. I did not dictate any part of it, or tell him how to do it. I just told him, "You were here at the conversation, you heard what took place, draw a cancellation."

(Testimony of Pierre Bercut.)

Q. As a matter of fact, is it or not true that on many things of that nature, you left the writing of a paper like that to Mr. Evans?

A. Very much so. I would be willing to sign anything he writes, but he insists on me reading it. In other words, I would be willing to sign anything he wrote for me.

Q. In the conference on April 26th, was the word "release" used by anyone present?

A. No, sir.

Q. Were the words, "personal release" used by anyone present?

A. No, sir.

Q. Was the word "cancel" or "cancellation" used?

A. That was the [352] only word that we used.

Q. Up to the time of the first conference, or up to the time of the conference had on April 26th, had you ever been given a copy of an assignment, or had you ever been told there had been an assignment of any kind from Serge Hermann, or from Chateau Montelena of New York, or from Mrs. Hermann, to Park, Benziger & Co.? A. No.

Q. When was the first time you ever heard or were told that there had been any assignment of the original contract of January 29th?

A. In that conference when Mr. Elman said that he had an assignment, but it didn't mean anything to me, because he was not going to have any part of it, and he would return it right away, and

(Testimony of Pierre Bercut.)

he looked in his pocket to give it, and he happened not to have it. He said, "You come to my room and I will give it to you," told Jean.

Q. You mean the conference of April 26th?

A. Yes.

Q. By the way, April 26th was a Monday.

A. Yes, Monday.

Q. When did you first see any paper or assignment such, for example as this paper dated February 25, 1943, the top one of the document that is marked Plaintiff's Exhibit No. 2?

A. I believe that was on the 27th.

Q. Was it before or after the conference of April 27th had broken up? A. It was after.

Q. Who showed you the paper there?

A. Jean Bercut.

Q. Your brother? A. Yes.

Q. This paper that we hold in our hand as an exhibit? A. Yes.

The Court: Exhibit No. 2?

Mr. Naus: Exhibit 2, your Honor. Thank you very much. You may cross-examine. [353]

Cross-Examination

Mr. Bourquin: Q. Will you say, Mr. Bercut, that you never saw the contract that your brother Jean procured from Mr. Elman until the 27th?

A. That was the only time I recall seeing it.

Q. When did you see it that day?

A. I don't know whether I first saw it that day

(Testimony of Pierre Bercut.)

or the next day; I think I left right after—I left right after that meeting.

Q. Do you mean to be understood to say that when you entered the meeting on the 27th you did not know there was an assignment in writing?

A. Yes. That was after the 26th, yes; that was the 27th, I think it was in the office that day.

Q. Did you know prior to the 27th that the assignment was in writing? A. No.

Q. You didn't know that? A. No.

Q. Did you know, when you entered the meeting on the morning of the 27th that the assignment was in writing? A. No.

Q. Did not know that, either? A. No.

Q. Had you talked to your brother, Jean, at any time between the afternoon of the 26th and the opening of the meeting on the 27th?

A. No. The next time I saw Jean Bercut was at the same meeting that I saw the other people, too.

Q. You had not spoken to him? A. No.

Q. He had not called you? A. No.

Q. He hadn't said anything to you?

A. No.

Q. Now, the day before, in the afternoon, didn't you send Jean up to—tell him to go and get the contract at the hotel?

A. That was in the presence of Mr. Elman and Mr. Hermann.

Q. The day before, in the afternoon, didn't you

(Testimony of Pierre Bercut.)

tell, didn't you say to your brother, Jean, "You go on up to the hotel and get the contract"?

A. I didn't send him to the hotel to get the contract. He went with Mr. Hermann and Mr. Elman, and I told him to [354] bring the contract with him, give it to him.

Q. Well, didn't you send him——

A. I didn't send him; he does things on his own accord.

Q. Well, did you ask him to go up to the hotel and get the contract?

A. No. He was there because he was taking these people home, I guess. He went there of his own initiative.

Q. You didn't ask him to go on up with them and pick up the contract?

A. If I asked him——

The Court: No, no. Did you ask him that? Did you ask him to go up and pick up the contract? Can't you answer the question directly?

The Witness: Your Honor, I believe I did, yes.

Mr. Bourquin: Q. You believe you did. Your dealings with Park-Benziger had been entirely satisfactory all of the time, hadn't they?

A. I didn't have any dealings with Park-Benziger. We had our dealings with Park-Benziger through Hermann. I never had any——

Q. Didn't you ship commodities, wine in bottles in carload lots, to Park-Benziger?

(Testimony of Pierre Bercut.)

A. Those deals were all made by Hermann in their behalf, I believe.

Q. Didn't you correspond with Park-Benziger after that about other matters.

A. We correspond to find out when we were going to get the money, that is the only thing.

Q. You always got your money for the wine you shipped, didn't you?

A. When I shipped to Park-Benziger, yes.

Q. You always shipped sight draft bill of lading, too, didn't you? A. Yes, we do.

Q. When you testified about this question of Mr. Hermann's integrity being raised by you or your brother on the 26th, you had no objection to Park-Benziger, had you?

A. We were dealing with [355] Hermann.

Q. Please answer the question. A. No.

Q. You had at no time any objection to them?

A. Objection to the customer of Hermann——

The Court: Read the question.

(Question read.)

The Witness: A. No.

Mr. Bourquin: Q. Had you ever, until the 26th of April, had any reason to believe that Park-Benziger could not perform the contract?

A. I didn't say——

The Court: Answer the question. Read the question.

(Question read.)

A. They had a contract——

(Testimony of Pierre Bercut.)

The Court: No. Answer the question, "Yes" or "No."

The Witness: A. No.

The Court: If you wish to explain it you may.

A. My answer is that I didn't know that I had any business with Park-Benziger except as a customer of Hermann.

Mr. Bourquin: This correspondence that has been introduced in evidence bearing your signature, you signed that, yourself, did you? A. Yes.

The Court: What do you mean "this correspondence"? Identify it.

Mr. Bourquin: All right, your Honor. [356]

Q. I refer you here to Plaintiff's Exhibit 5 under date of February 26 of Park, Benziger. You signed that yourself, Mr. Bercut, didn't you? Will you look at it, please.

The Court: Look at your signature.

A. Yes, sir, I signed this.

The Court: Q. You signed it?

A. Yes, I signed it.

Mr. Bourquin: Q. You dictated it?

A. No, sir.

Q. Was it prepared at your direction?

A. No, sir—well, the only instruction is to answer the letter; that is all.

The Court: Q. Who wrote it?

A. Mr. Evans.

Mr. Bourquin: Q. Did he write it at your direction?

(Testimony of Pierre Bercut.)

A. Yes, he wrote the letter at my direction but not my dictation.

Q. Do you want to say that you signed it with or without reading it?

A. I hope I read it.

Q. What? A. I hope I read it.

Q. Well, did you? You would know from your business practice.

A. I sign many letters sometimes without reading them. But I am not trying to get out of this. I must have read it.

Q. In the answer that you filed in this action, the answer to the complaint, is the allegation as a defense to the action on the contract that the Park, Benziger Company was unable to perform the contract, that they were not financially capable. You know that, don't you?

Mr. Naus: One moment. Objected to as not proper cross-examination.

Mr. Bourquin: Who verified the answer? I would like to see that, please.

Mr. Naus: I am submitting the objection. It is not proper cross-examination. It was not touched on in the direct. It is not even proper rebuttal. [357]

Mr. Bourquin: He is a party, your Honor.

The Court: I know he is. I am thinking about that.

Mr. Bourquin: All right.

(Testimony of Pierre Bercut.)

The Court: Overruled.

Mr. Bourquin: Q. You set that up as a defense to this action, didn't you, Mr. Bercut?

A. Yes, sir—my attorney did.

Q. What information did you have at the time you verified or signed the answer or filed it upon which to predicate that allegation in this court?

Mr. Naus: One moment, please. May I see the original answer, Mr. Mitchell?

The Court: I suppose the file is in chambers. Have you a copy there?

Mr. Naus: I just wanted to verify what Mr. Brownstone has told me and I understand to be the fact.

The Court: Ask my secretary for the original papers in this suit.

Mr. Naus: I believe there is a wrong assumption in the question.

The Court: I think it would be proper whether he signed it or not.

Mr. Naus: I am simply trying to point out under the new Federal Rules an answer only needs the signature of counsel, and I do not think the answer shows his signature or shows he ever read it. That is the only thing I want to establish, to let him see it first so he won't be mistaken in thinking that he did sign it, that he did read it, that he did swear to it.

The Court: I think you are right, Mr. Naus. Let us have the pleading. We will have a recess for five minutes.

(Testimony of Pierre Bercut.)

(Recess.) [358]

Mr. Naus: Here we are, Mr. Bourquin. It was as I thought. Under the new rules the answer is signed only by counsel and not signed or sworn to by the defendant.

Mr. Bourquin: Well, I guess because of those land cases I continually find myself operating under the old rules, since they are excepted. I would like to withdraw the question and reframe it, then.

Mr. Naus: Under the new Federal Rules some cases come under them and some do not. It is difficult for any trial lawyer to know when a case does and when it does not, and that is why I wanted to look at it.

The Court: Yes.

Mr. Bourquin: Q. Mr. Bercut, in the answer filed by the defendants Peter Bercut and Jean Bercut, doing business as P. & J. Cellars Company, a co-partnership, it is alleged as a fourth separate defense that the plaintiff never had and has not now the ability to perform the terms and provisions and conditions of the agreement marked as Exhibit A, as modified by Exhibit B, required to be performed therein by Chateau Montelena of New York, that referring to the contract and the supplemental agreement attached to it. What information did you have at the time the answer was filed on August 12, 1943 to support that allegation?

Mr. Naus: That is objected to as immaterial.

The Court: Overruled.

(Testimony of Pierre Bercut.)

Q. Did you know anything about it at all?

A. No; I gave the case to my attorney, and it was up to him to answer according to his method. In other words, I didn't tell my attorney what to do.

Mr. Bourquin: Q. I know your attorneys, and I know that [359] they did not file an answer on your behalf without getting full information from you, did they? A. I gave them the facts.

The Court: Direct your questions to the matter you have in mind specifically.

Mr. Bourquin: Q. Did you give your attorneys any information upon the question of the capacity of Park, Benziger to perform the contract in suit here prior to the filing of this answer?

A. I don't believe so.

Q. You did not have any information to question the capacity of Park, Benziger to perform the contract, did you? A. No.

Q. When the answer was filed you were as satisfied then as you were on April 26 that Park, Benziger was capable of performing the contract and was reliable to do business with, did you not?

A. I didn't have any contract with Park, Benziger.

Q. When the answer was filed you were as satisfied then as you were on April 26 that Park, Benziger was capable of performing purchase terms of the contract in suit, were you not?

(Testimony of Pierre Bercut.)

A. I wasn't referring to the contract in suit. I must have been satisfied; we offered to sell them wine.

The Court: Read the question. Listen to the question. If you don't understand it, say so.

(Question read.)

A. I don't know.

The Court: Q. What? You don't know?

A. I don't know yet.

Mr. Bourquin: Q. Let me refer you to that subject as you testified on your deposition on September 2, 1943 following the filing of the answer. Page 12, counsel—and if you agree, I will state it to the witness.

Mr. Naus: You may read it. [360]

Mr. Bourquin: I will read these questions and answers, Mr. Bercut:

“Q. Now, I will ask you the same question with regard to Park, Benziger. When did you ascertain that Park, Benziger did not have the ability to perform the agreement?

A. I never found out they couldn't perform. I never understood that I did business with Park, Benziger.

Q. Well, do you know whether or not they had the ability to perform?

A. I didn't look them up. We looked up Hermann.

Q. Let me ask you this question: Do you

(Testimony of Pierre Bercut.)

know whether Park, Benziger had the ability to perform the agreement?

A. I didn't look them up. I didn't have any business with them.

Q. Would you answer my question yes or no, and then you can explain.

A. All right. I don't know.

Q. Do you know whether Park, Benziger & Company had the ability to perform the agreement? A. I don't know."

Q. Was that your testimony?

A. Yes, and still is.

Q. And still is, is it? A. Yes.

Q. Now, then, the only objection you had to keeping or performing the contract in suit here was related to your objection to Mr. Hermann, wasn't it?

The Court: Would you read that question.

(Question read.)

A. Yes.

Mr. Bourquin: Q. You did not know of any reason to object to Park, Benziger to do business with at that time, did you?

A. I didn't object to them. I had no reason to object to them.

Q. You were not seeking to avoid business relations with Park, [361] Benziger when you consulted Mr. Elman with respect to Mr. Hermann on the 26th, were you?

(Testimony of Pierre Bercut.)

A. No; the proof is that I offered to sell him all the wine he wanted.

Q. You were not seeking a cancellation or a release of obligations to or a contract with Park, Benziger in your conference of April 26, were you?

A. I didn't have any contract with Park, Benziger.

Q. Will you answer the question: Were you that day seeking to obtain a cancellation or a release from any obligations to Park, Benziger?

The Court: Read the question. You may answer directly, and if you have any explanation, you may make it.

A. I will answer that if I may explain.

The Court: Read the question.

(Question read.)

A. I could say no.

Mr. Bourquin: Q. When you directed the preparation of the agreement here numbered Plaintiff's Exhibit 11—I call your attention to it, Mr. Bercut——

A. Yes, I know it.

Q. —you were not seeking to cancel or annul any business engaged in with Park, Benziger, were you?

A. No, for the simple reason I didn't have any business with them or contract.

Q. It was not your intention in directing the preparation of this nor in the presentation of the same to Mr. Hermann for signature to cancel or

(Testimony of Pierre Bercut.)

annul any business engagement with Park, Benziger, was it?

A. My understandings—I didn't have any with them.

Q. Will you answer, please? Was it?

A. To cancel with Park, Benziger?

Q. Was it your intention when you caused this instrument, [362] Plaintiff's Exhibit 11, to be prepared and presented it to Hermann for signature, to cancel or annul any business engagement with Park, Benziger? A. No.

Q. No. A. Can I explain?

Q. If you like.

A. I didn't have any business with Park, Benziger. I would have to cancel with the whole world, Park, Benziger was, so far as I knew, only a customer to Hermann.

Q. This agreement was not prepared or submitted with any intention of canceling or annulling any business engagement with Park, Benziger, was it?

A. It was canceling any agreement that I had with Hermann or anybody connected with it.

Q. Let us make that clear. Was it your intention to cancel or annul any agreement or engagement which bound you to Park, Benziger and Park, Benziger to you?

Mr. Naus: If the Court please, objected to as repeatedly asked and answered.

(Testimony of Pierre Bercut.)

The Court: I think it has been answered, counsel. I will sustain it on that ground.

Mr. Bourquin: All right, your Honor.

Q. Mr. Bercut, you sent samples of the wine covered by the contract in suit to Park, Benziger in New York, didn't you?

A. Under the direction of Mr. Hermann.

Q. Hermann? A. Hermann, yes.

Q. You sent a case of each wine specified in the contract to Park, Benziger in New York at the instance of Mr. Hermann, didn't you?

A. Correct.

Q. When Mr. Elman came to San Francisco you knew him to be the representative of Park, Benziger, didn't you? A. Yes, sir.

Q. You sat with him in more than one conference pertaining to the execution of the contract in suit prior to April 26, didn't [363] you?

A. With them, not with him.

Q. Well, with Mr. Elman and with others?

A. With Mr. Elman and Mr. Hermann always present.

Q. For example, in the course of one such conference, when a question came up as to the form of the labels to go upon the bottles, and a label concern was called up to answer an inquiry, your brother Jean in your presence making the call turned the call over to Mr. Elman, didn't he?

A. I am sorry.

The Court: Read the question.

(Testimony of Pierre Bercut.)

(Question read.)

A. He may. I wouldn't recall that.

Mr. Bourquin: Q. Let me read your testimony from the former trial on the subject to relieve it from any doubt.

Mr. Naus: The testimony on the deposition, Mr. Bourquin, or at the former trial, or whatever it was, was not on a label but on the subject matter of labeling.

Mr. Bourquin: Let me read the question and answer on page 32. You may be right, Mr. Naus. The record will settle it. I am reading the question and answer on page 32 of the transcript of the earlier trial.

“Q. Did you call Mr. Harshman of Fruit Industries regarding the question of proper labels and tax on the wine and turn the telephone over to Mr. Elman to talk to him about that?

A. No; I remember that it was my brother, Jean Bercut.

Q. Did he call Mr. Harshman at Fruit Industries and turn the telephone over to Mr. Elman to talk?

A. I believe so.”

Q. Do you recall that testimony? A. Yes.

Q. That was correct, wasn't it?

A. Yes. If I testified to [364] it, it was correct.

(Testimony of Pierre Bercut.)

Q. And as a matter of fact, when you signed the agreement on January 29 with Mr. Hermann you knew then that you would probably or might be doing business on this contract with Park, Benziger, didn't you?

A. No, it didn't impress me that way.

Q. You may refer to your testimony on that subject.

Counsel, if I have the note right, it is page—

Mr. Naus: I am not sure the witness had finished his answer.

The Witness: May I explain something, your Honor?

The Court: Yes.

The Witness: The question of the label didn't impress me a bit, because we have a large canning business and we have labels from every wholesaler in the country, practically. We have two ways of selling merchandise. One is with the buyer's label and one is with the manufacturer's label, so we have at Sacramento S & W, Haas Bros., Liggett, and so on—their, what do you call it, labels. So if somebody was going to label our wines with another label, that didn't impress me a bit. I didn't know what they were doing.

Mr. Bourquin: Q. Well, as I understand this subject matter, you and your brother Jean acted together in it, didn't you?

A. Yes; left most of it to Jean.

(Testimony of Pierre Bercut.)

Q. You did some, he did some, and it was mutually satisfactory; you were partners; is that correct? A. Yes.

Q. You knew what he did bound you, and he knew what you did bound him? A. Correct.

Q. On this subject that I asked you before I will call your attention to what was said—on page 9, Mr. Naus—on the [365] earlier trial.

“Q. At the time this contract was executed on January 29, 1943 did Mr. Hermann mention to you the name of Park, Benziger & Company?”

A. Yes, I think he did—not to me, but he mentioned it to Mr. Evans. I correct that.

Q. Was that in your presence?

A. Yes.”

You did so testify, did you? A. Yes.

Q. Was that correct? A. Yes.

Q. And continuing:

“Q. Will you give us, please, the place and who was present and the approximate time?”

A. When we agreed to the terms, prices and delivery, and the main subject of the contract, we decided to get something in writing, and then I asked my—what do you call him—book-keeper, if you want to, for that purpose—to draw a contract to cover the terms that we had in mind, and the first question that Mr. Evans asked Mr. Hermann was, ‘Who do you want

(Testimony of Pierre Bercut.)

the contract to, the name of the firm?' and Mr. Hermann said—he hesitated—and he said, 'Chateau Montelena.' He said, 'Maybe the best thing'—he said, 'Never mind. Make it to Chateau Montelena.' I remember that took place, or something like that, as much as my memory."

Is that correct? A. Yes.

Q. Did that happen as I read it?

A. Yes, sir.

Q. (continuing reading):

"Q. He said Chateau Montelena of New York, or Park, Benziger, is that it?

A. Well, that is the way I recollect it, but they amount to the same, I should say."

This question is by the Court: [366]

"Q. Was the name Park, Benziger mentioned?

A. It was mentioned, yes, your Honor."

You gave that testimony? A. Yes, sir.

Q. That was correct, wasn't it, Mr. Bercut?

A. Yes.

Q. He did answer, didn't he, Mr. Reporter?

A. Yes.

Q. You stated here today that there was a question arose concerning the packing or casing or preparation of wine subject to the contract—

Mr. Naus: Bottling, washing and racking.

Mr. Bourquin: Q. (continuing)—about which

(Testimony of Pierre Bercut.)

you said that Mr. Elman did not seem to be very happy.

A. That is right.

Q. Will you tell me if you have ever voiced or made that statement before in this trial on deposition?

A. In this trial?

Q. Or the last trial or on the deposition.

A. Yes, that was brought up some way or other.

Q. You think it was? When?

A. Either in the examination or deposition.

Q. How shall we understand your position? Is it that the cancellation here that you allege was prepared because Mr. Elman wanted it or because you wanted it?

Mr. Naus: Objected to as argumentative in the sense that it assumes the two things were mutually exclusive, when it might have been because of both.

The Court: Sustained.

Mr. Bourquin: Q. You said before that the written assignment attached to Plaintiff's Exhibit 2, being the Elman contract, never came under your observation until after Hermann had signed the agreement, Plaintiff's Exhibit 11, that I exhibited to you before?

A. Well, I must say that I am [367] not clear. It was between the two days. I can't honestly say it was that day—the first day or the second day—but I saw it.

Q. Did you see it before you presented to Mr.

(Testimony of Pierre Bercut.)

Hermann the Plaintiff's Exhibit 11, that agreement, to sign?

The Court: The cancellation agreement.

Mr. Bourquin: Yes.

A. I couldn't say that either.

Q. You couldn't say. Have you any other reason to offer why the name of Park, Benziger was not contained in that agreement than that?

A. The only reason, in my way of doing business, if you have a cancellation of a contract, you have it with the person you do business with. I had no other agreement with anybody else, so I could ask any other wine man to cancel with Hermann. The only man I did business with was Hermann. The only man I held responsible on that deal was Hermann.

Q. You said on direct examination that you took Mr. Elman to see the wines, but you said when you did get him there Mr. Hermann did all the showing to him; is that true?

A. Yes, sir.

Q. Will you explain to us why it was when you came to register an objection to Mr. Hermann on the 26th that you took that up with Mr. Elman and not Mr. Hermann?

A. Well, I didn't want to offend him. I wanted to know what his relation was, and we had been very friendly up to that time, and I didn't have

(Testimony of Pierre Bercut.)

any reason why I should not be polite about it. They were traveling together. It is just like I am going to say something about your friend. I would rather talk to you personally before, seeing how you feel about it. That is the reason why I wanted to know how he felt about my making those remarks.

Q. Did you receive a telephone call from Mr. Breslauer on [368] April 28 asking you for the return of Mr. Elman's contract?

A. Yes—I wouldn't know whether it was the 28th, but I received a call from Mr. Breslauer.

Q. Well, how would you relate the time with respect to the other events that you do remember the date of?

Mr. Naus: Mr. Bourquin, I would suggest this: Mr. Breslauer has said it was the 28th. I know he is a gentleman, a truthful man, and I will accept that and assume that the 28th was the date of the telephone call. I shall not challenge his statement.

Mr. Bourquin: Q. What did you tell Mr. Breslauer when he asked you for that contract?

A. I told him I didn't have it.

Q. Was he satisfied with that, or did he ask you more?

A. Then he said, "Who's got it?"

And I said, "My brother Jean, I suppose. I don't know anything about it. Call him up."

(Testimony of Pierre Bercut.)

Q. Where were you when you received that telephone call?

A. I wouldn't know. I may have been on Market Street, or it may have been in the office of the Merchants. When I came in the operators told me—

Mr. Naus: If the Court please, wasn't the answer complete when he said, "I wouldn't know" instead of conjecturing?

The Court: Yes.

Q. You do not know where you were when you got the message? A. No.

Mr. Bourquin: Q. You said you did not have it, your brother Jean had it, call him up?

A. I didn't say that.

Mr. Naus: He didn't say that, Mr. Bourquin. He said maybe Jean had it; he didn't know. [369]

Mr. Bourquin: Well, may I have it read back?

Mr. Naus: No objection.

The Court: Read it.

(Record read as follows: "A. Then he said, 'Who's got it?' And I said, 'My brother Jean, I suppose. I don't know anything about it. Call him up.'")

Mr. Bourquin: Q. You told him you did not know anything about it, is that correct?

A. No, I said I didn't have it.

Q. Did you tell him you didn't know anything about it?

A. I don't think so.

(Testimony of Pierre Bercut.)

Q. Did you tell him to call up Jean?

A. Yes.

Q. Did you communicate with your brother Jean about Mr. Breslauer's call?

A. I had no way of seeing Jean about it. The next time I saw him I probably told him.

Q. Probably? A. Yes.

Q. Did your brother Jean consult you or did you consult Jean after the formal demand for the return of the instrument was served upon him?

A. Yes—he consulted me.

Q. Did you receive any further telephone calls from Mr. Breslauer asking you to speak to him about the matter after that?

A. I wouldn't remember.

Q. Did you ever make any remark to Mr. Breslauer, or did Jean, to your knowledge, of his own inquiry, request for the return of the contract?

A. I wouldn't know.

Q. Who did you say it was, Mr. Bercut, that offered to cancel this contract?

The Court: Make it more specific. Who did you say offered when?

Mr. Bourquin: Q. At the meeting of the 26th, who did you say it was that offered or suggested to cancel the contract? [370]

A. I think Mr. Elman was the first one.

Q. Mr. who?

A. Elman. He said he didn't want any part of it.

(Testimony of Pierre Bereut.)

Q. Was the first one to suggest that Mr. Elman?

A. Either one of the two. I am satisfied it came from them first.

Q. Well, it may be important. Can you tell us which one it was? A. No.

Q. Let me ask you this. I am referring to his testimony on the last trial, Mr. Naus, page 46, please, line 14. A question by the Court:

“Q. Who suggested cancellation first?

A. Mr. Hermann told me about three times that he would cancel it, not to—anything that I didn’t want to comply with right away, he proposed to cancel.

Q. Who first said ‘cancel’?

A. Mr. Hermann, he said, ‘You can have my contract any time you want it.’

Mr. Breslauer: Q. Did you say Mr.—

A. Hermann.

Q. Hermann—Mr. Hermann?

A. Mr. Hermann, yes.”

Was that your testimony?

A. Wasn’t that the question on the 27th? He didn’t say three times on that conversation that day.

Q. Did you so testify at the earlier trial?

A. This that you are reading about came up on a different occasion, not on the 27th—or on the 26th.

Q. Let us get that. Did it transpire as I read it?

(Testimony of Pierre Bercut.)

A. Not on the same day. Those things happened on different occasions that I mentioned in that testimony.

Q. I will have to read that to you again to complete our record. Question by the Court: "Who suggested cancellation first?"— [371]

Mr. Naus: If the Court please, it has been read once. Is it necessary to read it twice?

The Court: I don't think so, not if the witness understands it.

Mr. Bourquin: Because I passed it without getting a direct answer, your Honor.

The Court: The only thing the witness said was that did not come up on the date that you said it did. It came up, he said, on a later date, and I think he used the word "27th."

Mr. Naus: I will say this, if the Court please: As to any testimony read by counsel, from either the former trial or from the deposition, I will stipulate that that testimony was in fact given on that occasion in the form read without any need of calling any reporter, notary, or anybody else, if that meets it.

The Court: What date is that?

Mr. Bourquin: We will have to go to the context, I am frank to say, to get it.

The Court: It may take too long to get that.

Q. You have no recollection that that was said on the 26th?

A. When we were talking about three times,

(Testimony of Pierre Bercut.)

that wasn't that day; that was a different occasion. For instance, the time he suggested I should wash the bottles, he mentioned that he was willing to cancel.

Q. Who said that?

A. Mr. Hermann said he was willing to cancel the contract, that he didn't want to go to the work that he asked me to do. And in some other conversation. I remember about three times he told me, "Any time you aren't satisfied, we'll just call it off." That is what he told me three straight times. [372]

Q. The question of Mr. Bourquin was whether or not you gave the testimony he read to you.

A. I testified that on the 27th I don't know who first spoke about cancellation.

Mr. Bourquin: Q. When was it that Mr. Elman first told you that Mr. Hermann would receive fifty per cent of the net profits from the sale of the wine?

A. I think it was on the 26th when I asked him what was the set-up between them. I said, "What is your connection? What is your relation, the two of you here, in regard to that deal? What is your connection with Elman?"

I asked Elman what was his connection with Hermann, how he was here, what he was here doing.

Q. All right. Let me pick this transcript up again on this subject, and I will refer to your state-

(Testimony of Pierre Bercut.)

ment as follows—I will commence with this: The Court said to you, “Letterheads?”

“A. Letterheads, to one another; but I knew that Hermann wasn’t going to drink the wine; I knew it was going to be sold to somebody; I didn’t know whether they were selling or getting together, I never asked him except the day that we canceled, what was his connection with it, how he intended to handle it. He told me that he intended to give half of the profit to Hermann.

I said, ‘That makes him a partner, and for that reason I can’t deal with Hermann on that wine.’ And they suggested to cancel, oh, three times.”

What day was that?

A. That was the same answer that I give now, but it wasn’t probably—maybe it came that way; I don’t know.

Q. What was the day that you first learned that Mr. Hermann was going to participate in 50 per cent of the net profits from the sale of the wine?

A. It was that day. [373]

Q. What day? A. On the 26th.

Q. On the 26th. Now, then, let me go immediately from that to the next question by the court:

“Q. Who suggested cancellation first?

A. Mr. Hermann told me about three times that he would cancel it, not to—anything

(Testimony of Pierre Bercut.)

that I didn't want to comply with right away, he proposed to cancel.

Q. Who first said, 'cancel'?

A. Mr. Hermann, he said, 'You can have my contract any time you want it.'

Mr. Breslauer: Q. Did you say Mr.——

A. Hermann.

Q. Hermann—Mr. Hermann?

A. Mr. Hermann, yes."

Q. Is that correct? A. That is right.

Q. Then was it Mr. Hermann who first suggested the subject of cancellation?

A. Is that what it says there? Correct.

Q. Going back for a minute, in answer to a question you said to his Honor Mr. Elman suggested cancellation when some disagreement arose about washing the bottles, is that right? A. Yes.

Q. What day was that?

A. That was during the previous week or so. I think they were down in the cellar occasionally once a day, and once during one of their visits.

Q. Was that prior to the 26th?

A. Oh, yes.

Q. That was prior to the objection you voiced about Mr. Hermann? A. Yes.

Q. And you say prior to that 26th Mr. Elman himself had suggested cancellation because of the difficulty on this agreement about washing the bottles? A. Yes.

Q. You are sure about that?

(Testimony of Pierre Bercut.)

A. Yes—Mr. Elman or Mr. Hermann?

Q. Mr. Elman, A. No, Hermann.

Q. Just this last question. Mr. Bercut, please: In the meeting [374] of April 26th was there a difference over whether or not the contract was assignable? A. Yes.

Q. Who brought that up?

A. I believe I did.

Q. You did. Tell us what you said.

A. I said, "I observe an assignment." I said, "What is the——" no——something was said about——Mr. Elman said he was out something. He says, "I am out some costs on that thing."

I said, "That is all right, why are you out?"

He said, "We had an assignment."

I said, "What do you mean, an assignment? This contract was not assignable."

He said, "It doesn't say it wasn't," and it remained that way.

Q. Didn't everybody get hold of the contract and begin running through it to see whether it was assignable or was not assignable?

A. It was a question put to us because it didn't say it should be or didn't say it wasn't.

Q. Was your copy of the contract produced and examined by all present to see whether it contained any provision against an assignment?

A. Yes.

Q. Just as Mr. Evans testified today?

A. Yes.

Mr. Bourquin: I think that is all.

(Testimony of Pierre Bercut.)

Mr. Naus: You may step down. The defense rests, your Honor.

Mr. Bourquin: I would like at this point, if your Honor will permit, to recall Mr. Jean Bercut for one question on recross-examination that I omitted this morning, or overlooked.

JEAN BERECUT,

recalled for further recross-examination.

Mr. Bourquin: Q. Mr. Bercut, this morning I asked you what concern it was that the Henri Behar represented that I [375] mentioned, and you said Vintage Wines, didn't you?

A. That is right.

Q. I omitted to ask you, and I want to ask you now, did you, following April 27th, sell the wine the subject of this contract in quantity to Vintage Wines at prices in excess of the contract price?

A. Yes, sir.

Mr. Naus: One moment please. The same objection heretofore made to all questions with respect to the sale of this wine subsequent to April 27th.

The Court: The answer may go out. Sustained.

Mr. Bourquin: Your Honor, I understand; I was merely connecting up the examination this morning. When I had examined the witness on that question—

(Testimony of Pierre Bercut.)

The Court: I was wondering why you recalled him when I heard the question.

Mr. Bourquin: It was called to my attention this morning that I had not covered the connection between Behar and the Vintage Wines, as to whether they had any connection with the subject-matter of the contract.

The Court: I do not see how they have. They haven't any connection.

Mr. Bourquin: It was on the subject as I said this morning, of motive and reason here.

The Court: Let the ruling stand.

Mr. Bourquin: That is all, your Honor.

May I consult with my associates?

The Court: Yes.

Mr. Naus: The defendants rests.

Mr. Bourquin: The plaintiff rests, your Honor. [376]

Mr. Naus: At this time, if the Court please, there are certain matters I presume should be taken up under Rule 50 out of the presence of the jury.

The Court: Yes. Before this is done I wish to know from both sides whether there is any further testimony to be offered by either side. The reason I ask you that is that I wish you to be definite about it, because when the hour of adjournment arrives it will depend on when I will continue the case to. Are you through with the testimony?

Mr. Naus: I am.

Mr. Bourquin: Plaintiff is, your Honor.

The Court: Both sides?

Mr. Naus: Yes.

The Court: No question about it?

Mr. Bourquin: No question about it.

The Court: Would you like to take these matters up on Monday, or would you like to take them up to-day? When I say "these matters," I mean any motion you may have to make, or any discussion regarding any motion.

Mr. Naus: I don't think that at this hour of 3:20 we could possibly conclude today, anyway, and it would be more connected rather than disconnected if we took them up Monday.

The Court: I was wondering if we could not devote Monday to that.

Mr. Naus: I think it may be done intelligibly that way.

The Court: Yes. Say at 10:00 o'clock.

Mr. Naus: Yes.

The Court: I will excuse the jury now until Tuesday morning, if agreeable.

Mr. Naus: Otherwise we will have the jury here waiting for [377] half a day for that purpose.

The Court: I understand there will be no request for any reopening of the case. That is settled, isn't it?

Mr. Naus: Yes, your Honor.

Mr. Bourquin: Yes.

The Court: How much time will you wish for

argument, gentlemen? The arguments will begin Tuesday morning?

Mr. Bourquin: I would suggest about an hour and a half to open and close would satisfy the plaintiff.

The Court: Two hours on each side.

Mr. Bourquin: Plenty.

The Court: Is that plenty?

Mr. Naus: Yes.

The Court: Ladies and Gentlemen, I admonish you you are not to discuss this case among yourselves or with any persons, and you are not to form or express an opinion on the case until it is submitted to you for your verdict. We will excuse you now until Tuesday morning, March 21st. Is that correct, Clerk?

The Clerk: Yes, your Honor.

The Court: Tuesday morning, March 21st, at 10:00 o'clock. Please return to this court and be in your seats at 10:00 o'clock Monday morning, March 21st. You may now retire.

(The trial was then continued until Monday, March 20, 1944, at 10:00 o'clock a.m.)

[Endorsed]: Filed Mar. 24, 1944. [378]

[Title of District Court and Cause.]

MOTIONS

Under Rules 50(b) and 59, FRCP.

The defendants Pierre Bercut and Jean Bercut move the Court as follows:

1. To order the verdict of March 22, 1944, and any judgment thereon, set aside and to enter judgment in accordance with the motion for a directed verdict made by these defendants at the close of all the evidence, upon each and all of the grounds specifically stated in support of such motion for a directed verdict when it was made. [379]

2. To grant a new trial on all of the issues, upon each and all of the grounds stated in support of the motion for a directed verdict, and upon the following additional grounds:

a. The Court erred in refusing to instruct the jury in accordance with Defense Requests Nos. 15, 16, 32, 33, 34 and 37, on the grounds stated in the exceptions taken in due time at the trial to the refusal of the Court to grant those requests.

b. The Court erred in modifying Defense Request No. 35 for an instruction by striking out the last sentence of the Request, as excepted to at the time of settlement of the instructions.

c. The Court erred in not instructing the jury that the maximum OPA markup was, and is, 25%, in response to the inquiry received by

the Court from the jury during their deliberations.

d. The damages awarded by the jury are excessive, in that the evidence did not, and does not, warrant or justify or support a verdict in any amount greater than \$29,432.85, if Hermann's 50% is not deducted, nor any amount greater than \$14,686.43 if his 50% is deducted.

WHEREFORE, defendants pray that their foregoing motions be acted upon by the Court in accordance with the procedure laid down in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243.

Signed:

GEO. M. NAUS

LOUIS H. BROWNSTONE

Attorneys for defendants Pierre
Bercut and Jean Bercut

Address: 706 Alexander Bldg.
San Francisco

To M. MITCHELL BOURQUIN,
ALFRED F. BRESLAUER,
GEORGE G. OLSHAUSEN,
THELMA HERZIG,
111 Sutter Street, Suite 1333,
Attorneys for plaintiff

Take notice that the undersigned will bring the above [380] motions on for hearing before the above-entitled court on the 1st day of April, 1944, at ten

o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed

GEO. M. NAUS

LOUIS H. BROWNSTONE

Attorneys for defendants Pierre

Bercut and Jean Bercut

Address: 706 Alexander Bldg.

San Francisco

(Acknowledgment of Receipt of Copy)

[Endorsed]: Filed Mar. 27, 1944. [381]

Monday, March 20, 1944

The Court: Park, Benziger & Co. v. Bercut, et al.

Mr. Naus: Shall I proceed, your Honor?

The Court: Yes, Mr. Naus.

Mr. Naus: At this time, if the Court please, pursuant to leave granted at the last adjournment to postpone to the present time the making of any motions, the defendants Bercut at this time, and at the conclusion of the whole of the evidence, move the Court to direct the jury to return a verdict in their favor upon the following grounds:

1. That the evidence shows that the contract was terminated by abandonment or cancellation on April 26th and 27th, 1943.

2. That the evidence shows that there was a joint venture between Serge Hermann and the plaintiff,

and that they acquiesced with the defendants Bercut in cancelling or abandoning the contract on April 26th and 27th, 1943.

3. That the evidence shows that Serge Hermann was a member of a joint venture and that he bound the venturers by his act in signing the writing in evidence here as an exhibit, the writing of April 27, 1943.

4. That the evidence shows that plaintiff, Park, Benziger & Co., was a member of a joint venture, a joint commercial venture, and that in that joint venture it was represented as to the joint venture by its vice-president, Mr. Elman, who acquiesced in the termination by cancellation of the agreement on April 26th and 27th, 1943.

5. That Louise Hermann, doing business as Chateau Montelena of New York, was, as one of the original contracting parties, bound [384] to maintain an ability to perform the contract, but eventually allowed her liquor license to terminate on February 28th, 1943, without renewal, and therefore disabled herself from performing from March 1, 1943 onward.

6. That the burden is on the plaintiff to show its own ability to perform, which ability has not been shown. In fact, the evidence shows that it would have had to finance the purchase of the wines under this contract with the Bercuts beyond the plaintiff's own means or assets.

7. That the plaintiff's claim is for loss of profits, but the evidence fails to show that when the con-

tract was entered into on January 29, 1943, and as modified on February 3, 1943, that either or both of the defendants Bercut knew that the goods were not obtainable elsewhere or would not be obtainable elsewhere in the event of non-delivery by the defendants.

8. Upon the ground that the evidence in the case of loss of profit, such evidence as there is or to the extent that it could be said to be evidence, does not prove or show with reasonable certainty that the plaintiff suffered loss of anticipated profits, because the evidence shows that the plaintiff was launching a new enterprise with respect to the wine in suit, and the profits, if any, therefrom are left to guesswork, surmise, conjecture.

9. Upon the ground that lost profits have not been proved with reasonable certainty because the evidence shows that plaintiff had, during the year 1942, handled in various lots an aggregate of eight or nine thousand cases of California wines, but has made no showing of its loss of profits expected upon that wine, but on the contrary, instead of turning to better evidence has used worse or poor evidence by way of opinion or estimate or guesswork. [385]

10. Upon the ground that lost profits have not been proved with reasonable certainty because the evidence shows that concurrently with the contract of January 29th, as modified on February 3, 1943, the parties to that contract and to the assignment thereunder have concurrently or contemporaneously dealt in other California wines outside the contract

to the extent of two carloads ordered under the letter of February 15, 1943, signed "Serge", and addressed to the defendants; to the extent of a subsequent carload ordered on April 27, 1943, on the morning of the signing of the cancellation agreement, and to the extent of further wines discussed on the afternoon, or during the day, rather, of April 27, 1943, at the office of the Bercuts on Market street, above the Grant Market, and to the extent of some wine ordered by the plaintiff from the defendants and shipped to the plaintiff from the defendants even since this suit was commenced.

The Court: Is that the wine which has been mentioned as the Chianti wine?

Mr. Naus: Exactly.

The Court: How many carloads were there of that in all?

(Discussion.)

Mr. Naus: Mr. Brownstone suggests, if your Honor has no objection, that I might restate the ground we have just been discussing in one connected form, so there may be no disagreement between counsel as to just what it covers, if your Honor will permit.

The Court: Yes.

Mr. Naus: 10. That lost profits have not been proved with reasonable certainty, because the evidence shows that concurrently and contemporaneously with the transaction covered by the contract of January 29, modified February 3, 1943, the parties [386] in this litigation dealt in California wines

of the Chianti type, or in Chianti type bottles, the wines being purchased by the plaintiff from the defendants to the extent of 3250 cases under the written order of February 15, 1943, followed to the extent of at least one carload, the evidence in other respects showing a carload is somewhere in the neighborhood of 1500 cases, ordered on April 27, 1943, and to the extent of an unspecified amount, apparently approximately a carload, at least a carload ordered by the plaintiff from the defendant during the pendency of this suit, and the rule of law with respect to proof of lost profits being that past profits upon which the prediction must be made, that to the extent of past profits the loss may be shown from experience and from accounting records and accounting data and the like, which must be shown, and not be left to mere guess or surmise or conjecture or upon hope or expectation not founded upon past experience.

11. Lost profits have not been proved with reasonable certainty, because the evidence shows that the plaintiff intended to wash the bottles, the bottles containing the wine, and wrap each of them in tissue paper before reselling them.

The Court: It seems to me that was left undecided; in other words, left in the air.

Mr. Naus. No. It is hardly left in the air. It is worse than being merely in the air. I would like to add one further sentence to that.

The Court: Go ahead.

Mr. Naus: No proof of the labor cost thereof,

nor has it been shown what capital would be used by the plaintiff in the conduct of their transactions in this line, and the amount of interest upon that capital. [387]

12. That the plaintiff not only has failed to make such a showing of loss of anticipated profits as is required by the law, but, in the alternative, the plaintiff has also failed to prove the amount of any outlay by it in preparation for performance in lieu of the proof with reasonable certainty of lost profits.

(The motion was then argued by respective counsel and a recess taken until 2:00 p. m.) [388]

Afternoon Session, March 20, 1944, 2:00 P. M.

The Clerk: Park, Benziger & Co. v. Bercut, et al.

The Court: The motion for a directed verdict is denied.

Mr. Bourquin: If your Honor please, I take it that you intend to give counsel the opportunity to discuss the instructions this afternoon?

The Court: Well——

Mr. Bourquin: I am not asking for that, but what I was going to suggest was this, that in view of the fact that Mr. Olshausen has more familiarity with this than I have, and is handling the matter of instructions, if it might be agreeable to your Honor that I be excused. I have some things to look after, which I should like to attend to, unless I am needed here.

The Court: I have no objection if you wish to be excused.

Mr. Naus: The reporter may note an exception to the denial, your Honor.

Mrs. Herzig: At this time, your Honor, plaintiff would also like to make a motion for a directed verdict on all issues other than the issue of damages.

The Court: Are we going to have some argument on this?

Mrs. Herzig: That is what I would wish to do at this time, if you will give me permission.

The Court: When will we get through with this matter?

Mrs. Herzig: If you would like, I will simply make the motion and submit it on the basis of the memorandum of points and authorities, that I have prepared.

The Court: The motion is denied.

I will now take up the matter of instructions under Rule 51 of the Federal Rules of Civil Procedure. I shall state to you the [389] order in which I expect to give these instructions, and, of course, that will mean that it will not be in accordance with the numbers of the proposed instructions submitted by either side. So you will have to watch your instructions carefully so that you may note each one and will be prepared to hereafter address the Court upon them.

I shall give plaintiff's instruction No. 1, striking out on lines 15 and 16 the words, "to sell and deliver 60,000 cases of wine." Have you that instruction?

Mr. Naus: Does your Honor desire for us to wait until the conclusion of your entire announcement?

The Court: Yes. Make notes now on your instructions and then you can make statements or arguments hereafter.

I shall give Plaintiff's instruction No. 7. If I go too fast for you will you let me know?

Mr. Naus: I shall.

The Court: I shall give defendants' request No. 2. These instructions will be followed by what I call our stock instructions. Those instructions are the instructions usually given by the court in civil cases with which both sides are familiar.

Mr. Naus: That is in accordance with the usual practice of this court.

The Court: Yes.

Mr. Naus: That is perfectly satisfactory. I would simply like to draw attention to one of the usual stock instructions.

The Court: Yes.

Mr. Naus: The presumption that evidence willfully suppressed would be adverse if produced. That is under section 1963 of the Code of Civil Procedure, one of the stock instructions.

The Court: I do not think that is in my instructions. I am [390] not sure.

Mr. Naus: That is an instruction commonly given.

The Court: I see no objection.

Mr. Naus: It is a stock instruction.

The Court: Following the stock instructions, I will give plaintiff's No. 2. I will slightly change the introduction. Instead of saying, "The Court instructions," I will say, "I instruct you."

I shall give plaintiff's instruction No. 3, amended as follows: striking out the initial words, "The Court," I shall substitute in lieu thereof, "I"—"I instruct you." And lines 13, 14, 15 and 16, I will strike out the words, "and that Park, Benziger & Co.. Inc., the plaintiff, was thereafter entitled to receive performance of the contract from the defendants."

I shall give plaintiff's instruction No. 5-F. Briefly stated it reads, "The law does not require an assignment to be in any particular form."

I shall give plaintiff's instruction No. 5-E.

Mr. Naus: The ones that I have are not numbered beyond 5-D. May I have the identity of 5-E?

The Court: Yes. I will read it to you:

"If by its terms the obligations of a written contract are expressly made——"

Mr. Naus: I have found it.

The Court: I shall give that. I shall give plaintiff's instruction No. 6, amended as follows: After the date, "January 29, 1943," line 18, I shall add the words, "and that the contract was not terminated." Have you got that?

Mr. Naus: There is only one place——

The Court: Line 18 after, "January 29, 1943."

[391]

Mr. Naus: The difficulty is, what was served on me is not numbered, and there are two places where January 29th appears in the unnumbered copy I have.

The Court: Line 18.

Mr. Olshausen: Mr. Naus is correct. The copies we served on him were not given numbers.

The Court: It is three lines from the bottom.

Mr. Naus: "And that the contract——"

The Court: "And that the contract was not terminated after January 29, 1943."

I shall give plaintiff's instruction No. 9.

Also plaintiff's instruction No. 8, inserting on line 11, after the word "contract," the phrase, "And if you find the original contract was not abandoned," set off in commas.

Mr. Naus: May I look at counsel's? I still cannot identify where that is by number. The rules require them to serve it by number and I can't find it.

The Court: I am sorry. They ought to have done it, of course. It is on the next to the last line after the word "contract."

Mr. Naus: Thank you, your Honor.

The Court: "Contract, and if you find the original contract was not abandoned."

Mr. Naus: Thank you.

The Court: I shall give plaintiff's No. 11, as amended. Have you got it there?

Mr. Naus: I have an 11, but I do not know what amendment means.

The Court: I will give it to you if you will listen. I am striking out the initial words, "you are instructed that." [392] The instruction will then begin, "The defendants." Strike out the word

“herein.” Then I strike out all of the second paragraph.

I am giving all of defendants’ request No. 3.

I shall give plaintiff’s instruction No. 12 as amended. Strike out the first sentence. On line 11, or take the second paragraph, after the words, “If you find that,” I insert the words, “the circumstances show,” and strike out the words, “there was.”

I shall give defendants’ request No. 4.

I shall give defendants’ request No. 5 amended by inserting the words on line 9 after the word “abandoned,” the words “by all parties.”

I am giving defendants’ request No. 1.

I am giving defendants’ request No. 6.

I will give defendants’ request No. 17 amended as follows: strike out on line 10 the words, “was a partner or.” Also strike out after the word, “adventurer” on the same line the words “of or.” Insert on line 11 after the name “Park, Benziger,” the following: “and that he signed on behalf of the joint venturer.”

I shall give plaintiff’s instruction No. 5(c). Have you got that, Mr. Naus?

Mr. Naus: Yes, I have that.

The Court: Also plaintiff’s 5(b).

I shall also give defendants’ request No. 18, striking out on line 7 after the word “persons” the word “and.”

I shall give defendants’ request No. 7 and I am changing the word “could” on line 14 to “might.”

Instead of "you could infer" it will read "you might infer." [393]

I shall give defendants' request No. 8; also defendants' request No. 9; also defendants' request No. 10; also defendants' request No. 11; also defendants' request No. 12.

I shall give defendants' request No. 14 amended as follows: On line 7 I am striking out the words, "It is more important to" and inserting in lieu thereof the words, "you may." On line 9 I am striking out the words, "The evidence at bar shows," and inserting in lieu thereof, "If you find from the evidence."

On line 11, after the word, "it" I am striking out the word "and" and after the word "are" I am striking out the word "therefore."

I did not have an opportunity to look at the New York General Corporation Law with reference to plaintiff's instruction No. 5(a). I have it in chambers but I have not had an opportunity to read it to see whether or not it supports that instruction.

Mr. Naus: I am prepared—

The Court: The Clerk has handed me the book now. Section 120 on page 80 of the General Corporation Law, McKinley's Consolidated Laws of New York, Annotated, Book No. 2, reads as follows:

"Corporations have no power except where it is conferred upon them to enter into a partnership."

I suppose the law is the same as it is in California?

Mr. Naus: No. Would you like to hear from me on that?

The Court: I do not know whether I want to hear this minute or not.

Mr. Naus: Maybe you could defer it.

The Court: The Articles of Incorporation are not in evidence. We will take that up later. We will pass the matter of this instruction, plaintiff's No. 5(a). [394]

I shall give defendants' request No. 19 amended as follows: Inserting on line 10 after the word "exist" the following words: "And defendants relied on such representation in making the termination agreement," set off by commas. Did you get that?

Mr. Naus: Yes, your Honor.

The Court: I am giving plaintiff's No. 10.

I am giving defendants' No. 20, striking out the first word, "now."

I am giving defendants' request No. 21, also defendants' request No. 38.

I am also giving defendants' request No. 28 amended as follows: On line 7, after the word, "market," striking out the following words: "Accordingly we must turn to the other rule for measuring damages and"—striking out those words.

I am giving defendants' request No. 36.

I am also giving defendants' request No. 35 amended as follows: On line 3, striking out the

words, "have used" and inserting in lieu thereof the word "use."

I shall give defendants' request No. 31, striking out the initial word "now."

I shall give plaintiff's instruction No. 15 amended as follows: Have you got it?

Mr. Naus: Yes, your Honor.

The Court: Striking out on line 11 the figure "60,000" and inserting in lieu thereof "26,691." And striking out on line 12, after the word "inspected," the following words: "and if you find that said wines are unobtainable on the market."

Mr. Naus: Those words are being stricken out?

The Court: Yes. "And if you find said wines are unobtainable on the market," being stricken out, and inserting after the word [395] "exceeding" on line 15 the words "the amount of any such profit." Striking out the figures, "237,750." Have I made that clear?

Mr. Naus: Yes, your Honor.

The Court: "If your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding the amount of such profits as and for general damages," striking out the figures and the dollar sign, "\$237,750."

I am also giving defendants' request No. 39.

I shall give defendants' request No. 40.

I shall also give that instruction with which you are familiar, relating to pooling: "In arriving at your verdict you must not resort to the determination of chance; that is, you must not arrive at your

verdict by dividing by twelve, or any other number, the sum of the various amounts at which each of you would fix the verdict and then take the quotient as the verdict." That is under C.C.P. 6572.

Mr. Naus: Now, if you want the exceptions taken by each side first?

The Court: Just a minute. I expect to refuse to give the following: Defendants' request No. 23, defendants' request No. 26, defendants' request No. 27, defendants' request No. 24, defendants' request No. 25, defendants' request No. 13, defendants' request No. 15, defendants' request No. 16, defendants' request No. 22, defendants' request No. 29, defendants' request No. 30, defendants' request No. 32, defendants' request No. 33, defendants' request No. 34, defendants' request No. 37, plaintiff's request No. 1(a), plaintiff's No. 4, plaintiff's No. 5, plaintiff's No. 5(d), plaintiff's No. 13, plaintiff's No. 14, plaintiff's No. 16(a), plaintiff's No. 17, plaintiff's No. 15(a), plaintiff's No. 16. [396]

If I should change my mind in giving or the not giving of certain of these instructions I will notify you before the argument starts tomorrow. Now, Mr. Naus, do you wish to say something to me about one of these instructions——

Mr. Naus: On partnership?

The Court: Yes.

Mr. Naus: If the Court please, what I wish to point out to you is this, that the New York statute, for reasons that I will give and citations that I

will give you, has no bearing whatever upon this case.

The Court: Is the provision of the statute similar to the statute of California?

Mr. Naus: I know of none in California.

The Court: I thought there was some law in California relating to the matter.

Mr. Naus: I think there is. I have four points of law that I will cite to you, but I wish to first point out in addressing myself to those that the litigation here does not go to the internal administration of the corporation, but goes to the action of third persons. With that in mind I first cite the California Constitution, Article XII., section 15, which, speaking generally, goes to the proposition that a corporation organized outside of California cannot do business on any more favorable terms than a domestic corporation. And guided by that I next cite the Civil Code of California, section 345, and to point that citation I will say, if the Court please, that we had such a doctrine in California up until the Legislature of 1931, a doctrine known as *ultra vires*. What we are talking about here is whether they can go into the question, Is or is not a partnership *ultra vires* the corporation? In 1931, to section 345 of the Civil [397] Code there was added a paragraph that reads as follows:

“No limitations upon the business, purposes or powers of the corporation or upon the powers of the shareholders, officers or directors, or the manner of exercise of such powers, con-

tained in or implied by the articles or by chapter 15 of this Title, shall be asserted as between the corporation or any shareholder and any third person."

Then the last sentence of that section reads—and I am just deleting parts that do not belong here—"This section shall extend to contracts and conveyances made by foreign corporations in this State and to all conveyances of real property situated in this State by foreign corporations."

So my first proposition here is that the instruction they are asking you to give is an instruction to the jury that a partnership as such was *ultra vires* of the corporation, this Park, Benziger & Co. Under the California constitution and the statute that is entirely out of place, because in litigation with a third person there is no room for the doctrine of powers or lack of powers. There only remains the question, What did the corporation do? If it entered into a partnership it is bound by it.

Next turning to the proposition No. 2 on that, I turn to the Uniform Partnership Act, itself, which has been adopted in California, and I cite two sections to be read in *pari materia*, to be read together. I first cite section 2396 of the Civil Code, which was one of the earlier sections of the act, which defines the word "person" as including corporations. Read that in connection with 2400, defining a partnership, and when you read those two together it is obvious that the purpose of the Uniform Partner-

ship Act was to do away with the old discussion in the books as to whether a corporation could end a partnership. [398]

Proposition No. 3. The record in this case shows no lack of power.

Proposition No. 4 is that, after all, these older cases that go to the question of whether a corporation could or could not go into a partnership have really been done away with by the body of modern law, as to which there is the rule in California, and the modern law cited in 80 A.L.R. page 1049, also in 19 Corpus Juris Secundum 398, that when instead of going into a partnership generally, a corporation enters into a joint commercial venture, it is given all the qualities and characteristics of a partnership so far as obligation and liability is concerned. Those are the four points. As I say, the first one is the main one: Notwithstanding anything in a foreign statute, notwithstanding anything in the article or not in the article, there is now no longer any room in California to entertain in any litigation between a corporation and a third person, a stranger—there is no room to entertain any discussion whatsoever of any *infra vires* or *ultra vires*, and that is all it goes to, and our constitution forbids foreign corporations from doing business on any more favorable terms than domestic corporations.

The Court: I am familiar with that.

Mr. Olshausen: As I understand it, my understanding is what your Honor said: The rule is substantially the same in New York and in California,

and in this case we put the New York law there because it was a question of the powers of a New York corporation. Now, what counsel attempted to say that California abolished the entire doctrine of ultra vires. I do not understand the amendment that way. First of all I will say, with respect to the very last point that counsel made, bringing in the [399] joint venture, we did not request a parallel instruction on joint venture. We merely requested our instruction on the power of this corporation to enter into a partnership. Now, the corporation has no power to enter into a partnership, and the question there is only the question as to the reliance by the Bercuts. The question that it has not right as against third persons, as I understand it, means that it cannot disclaim the contract as against the persons with whom it contracted, in other words, which in this case would be Hermann. The furthest that that California provision goes would be to say that it cannot disclaim it against Hermann. But the point is if Hermann is acting for the corporation, they know that, prima facie, Hermann cannot act for the corporation, because, prima facie, the corporation could not enter into a partnership with Hermann. Now, that is there and the jury is entitled to be instructed on that legal question, and, as I say, we adopted the New York law because this is a New York corporation, and the instruction that the corporation has no power to enter into a partnership is relevant so far as it goes.

The Court: Do you wish to call my attention, or rather except at this time to any instruction?

Mr. Olshausen: Yes, I do.

The Court: I think it would be proper for you to do that at this time.

Mr. Olshausen: Yes. That is what I wanted to do, and I will say this: That instruction was drawn on the supposition that the articles would be part of the record.

The Court: Is there any objection on your part, Mr. Naus, of my letting this evidence in now, those articles of incorporation?

Mr. Naus: Well, if they are offered now—I will say this: [400] I would rather put it this way: I will make no objection to your Honor's granting leave to reopen the case for the limited purpose of offering one document, but if the case is reopened and the document offered, I will then make an objection to the offer.

The Court: I was going to say if there was any objection——

Mr. Naus: There will be an objection, of course. Let it in over my objection. But I would rather that it take that form, so if it comes in the ruling will be clear as to the position I took on it and the objection I made. But, of course, as I say, reopening the case for that limited purpose of offering that one paper, and I know what the one paper is, I would not oppose the reopening for that purpose.

The Court: I will let you know later.

Mr. Olshausen: For the record, in the instructions given but modified, we except to the modifications of instructions 1, 3, 11 and 15. That merely

preserves the point on which the new trial was granted in the first place.

The Court: Yes.

Mr. Olshausen: I will take next the instructions that were granted on the defendants' request. I think I mentioned 11 there, but if I did not——

The Court: Yes, you did, you mentioned 11.

Mr. Olshausen: Yes. That is a different issue. Does your Honor want me to run over those quickly? In other words, I have them written down here. Does your Honor want to follow me as I call attention to them?

The Court: Just as you have them.

Mr. Olshausen: I have them listed by numbers here.

The Court: Those that you want to except to?
[401]

Mr. Olshausen: Yes.

The Court: Go ahead.

Mr. Olshausen: Then in the instructions given at the request of the defendants, we except in so far as the instruction No. 3 implies that there may have been evidence of a written cancellation by the plaintiff.

The Court: Where is that now? Defendants' 3?

Mr. Olshausen: Defendants' 3, yes. It says here the contract may be abandoned by a written agreement, or an oral agreement or understanding partly in writing and partly oral, and then it goes on to say:

“If you find that on or about the 26th and

27th days of April 1943 Serge Hermann and plaintiff and the defendants herein mutually agreed to terminate or abandon the contract. . . .”

The Court: Your exception is based on what ground?

Mr. Olshausen: It is based on the ground that the motion of the plaintiff might be read back to be connected with the previous motion of a written agreement. There is no evidence that the plaintiff, himself, signed a written agreement.

The Court: The contract may be abandoned by a written agreement, or an oral agreement, or an agreement or understanding partly in writing and partly oral. By the way, that says plaintiff's instruction No. 1. That is not correct, is it?

Mr. Olshausen: No, that should be No. 2.

Mr. Naus: That came about because it was numbered No. 1 at the former trial.

Mr. Olshausen: We also except to that instruction as far as it refers to an agreement that is partly in writing and partly oral, on the ground there is no such agreement as to either [402] plaintiff or his assignor.

The Court: All right.

Mr. Olshausen: The next is instruction No. 4. We except to that on the ground that the defendants rely on a written instrument, and that all other acts are excluded by the operation of the written instrument. They do not rely on acts outside the written instrument.

Mr. Naus: I certainly do.

Mr. Olshausen: No. 5. We except to it in so far as it discusses the question of revival, because there is no issue of revival in the case.

The Court: Next?

Mr. Olshausen: The next one was No. 1. We except to that on the ground that there is evidence on behalf of the plaintiff that Hermann was the agent of the Chateau Montelena, from which it can be inferred that there was a difference, and consequently there should be no categorical instruction that they are exactly the same.

The Court: I do not know whether it would make any difference one way or the other whether the instruction was given. I think it states the facts. It states what the evidence shows.

Mr. Olshausen: It states what some of the evidence shows.

The Court: You may proceed.

Mr. Olshausen: The next one is No. 6. We except to that on the ground that it is too broad and invites the jury to determine questions of law. It says, "You must therefore consider and determine the relationship between Serge Hermann and the plaintiff."

Now, that partly involves a question of law which should not be submitted to the jury, and, furthermore, the instruction [403] says because it was signed only by Serge Hermann, you must, therefore, consider the relations. Now, the second sentence does not follow from the first one.

The Court: All right.

Mr. Olshausen: The next one is 17. We except to that on the same grounds that we except to the

refusal of our instruction 5(d). In other words, one joint venturer cannot abandon.

18. We except to that one on the same grounds. And 7 again involves the same point. We except on the ground there is no evidence showing that Hermann acted on behalf of the joint venturer and not on behalf of himself.

No. 8 we except to only in so far as we claim there is no issue of partnership to be submitted to the jury.

No. 9 we except to on the ground that we take the position that there is insufficient evidence of a joint venture to submit to the jury.

No. 12, I believe, is an attempt to state ostensible agency, but I think an incorrect attempt. It says:

“I further instruct you that in this lawsuit the question is not merely whether there was a joint adventure as between Serge Hermann and the plaintiff, but whether as between them on one side, and the defendants Bercut on the other, there was one; and in such situation the relationship of joint adventurers may be determined by you from the apparent purposes and the acts and conduct of Hermann, Elman and Benziger, because the law says that the acts and conduct of parties may speak above their expressed declarations to the contrary.”

Now, up to those words, the words “acts and conduct of the parties,” it is an attempt to state the law of ostensible [404] agency, but it does not state it. It does not set forth the elements. It merely says, “You have to decide whether it was a joint

venture between the plaintiff and the plaintiff's assignor on the one side and the defendants on the other. The last words are quoted from one of the cited cases, I believe from the universal sales corporation case, and they are quoted in connection with a case merely. It says you can have an implied contract. In other words, you may imply a contract from the acts of the parties which, of course, deals with an actual contract, an actual agency, and not merely an ostensible agency, and it is using the law on an implied contract in an instruction which attempts to cover the question of ostensible agency.

Next is 19, and there again we make the same exception as to the refusal of our instruction 5(d), that it assumes that one joint venturer has the power to cancel for the others, and furthermore, it leaves out the element which your Honor added in one of the other instructions, that the cancellation may not purport to have been on behalf of the joint venturer, because this simply says that if there is an ostensible joint venture, the plaintiff is bound by the acts, but it leaves out the point that even if there is an ostensible joint venture, the cancellation still might have been made by Hermann on his own behalf.

The next one is 38. We except to that the same way that we except to the modification of our instruction No. 1. That reserved the earlier point.

The next is 36. We except to that because it puts the burden on the plaintiff of proving the O.P.A. limitations on their own case. In other words, it says:

“In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to [405] determine net profits, I instruct you that you cannot in any event use a greater mark-up by plaintiff over the cost to it than the mark-up permitted under O.P.A. regulations as a price ceiling; and the burden of proof is on the plaintiff.”

Now, it is not clear just the burden of proof of what, but it sounds as if he is saying you have to prove the O.P.A. maximum, and I do not believe that is part of the plaintiff's case.

On 35 the instruction is that the 50 percent selling commission which was to have been paid to Hermann is to be deducted—that is, in the first place, it is made a categorical instruction; in the second place, I think it is contrary to all the evidence, as even the defendants' witnesses refer to the contract as being a participation by Hermann in the net profits. In other words, Hermann possibly could have joined as plaintiff but did not, and the fact that the plaintiff may have divided its recovery with somebody else is no concern of the defendants. But this categorical instruction tells them that the 50 percent has to be deducted.

The Court: It is a part of the expense, isn't it?

Mr. Olshausen: Not if it is a participation in the net profits. At very least the instruction would have to be, “If you find it one thing, it is one thing, and if you find the other way, it is the other way.” This categorically states they have to deduct 50 percent. I think that is certainly incorrect.

The other point is our conception of the evidence is both the plaintiff and the defendants agreed that this was to be a participation in the net profit, and so would not be deductible from the net profits afterwards. But certainly a categorical in- [406] struction to deduct 50 percent. I think it is incorrect.

The next is No. 31, and I believe, first of all, the sentence right after the footnote 1, that is not peculiar to the law of sales alone. I do not know that there is any point in instructing them excepting on the law of sales when it is a sales case. Now, in the second place, I think that the damages were proved definitely, and that there is no occasion for an instruction on guesswork, and from that standpoint we except to it as not being supported by evidence.

The next is instructions 39 and 40, and I want to take 40 first. I have a case here which I did not have this morning, and to which I call your Honor's attention. It is *Gilson v. F. S. Royster Guano Co.*, 1 Fed.(2d) 82. It is the Third Circuit Court of Appeals, and particularly with reference to instruction No. 40 I think it is directly contrary, because this says if they offered it for cash in advance—now, this case is also a cash-in-advance case—and the counter offer was for cash in advance, and while they put it on the ground that it required them to waive their right to damages otherwise, and distinguished *Lawrence v. Porter*, and the *Stoddard* case—no, they distinguished *Lawrence v. Porter*—I think this is the latest case on the subject—and as I read it it is contrary to instruction 40. In instruc-

tion 36 we have the same problem, the requirement to accept a counter offer, that is, a contract under different terms, and the same general rule which is in this Gilson case would eliminate instruction 39 also.

Then in the refusal of our requests we except to the refusal of 1-A, 4, 5, 5-B, 13, 14, 15-A——

The Court: 16-A?

Mr. Olshausen: Yes, 16—— [407]

The Court: 16-A.

Mr. Olshausen: 16-A I have here, and 16 is, too; I haven't come to it yet. Yes. 16. That simply again is the same point which came up, in part, at least, on the granting of the first motion for a new trial, and 16 is the same way, 16-A. That is all.

Mr. Naus: If the Court please, in so far as the defendants' requests that you state you intend to give or are to be given in a modified form, we except to the indicated modifications, and I follow them as I go along, and only in one instance do I find any change which I would consider some change in substance, and upon comparing it I think it tended to improve the instruction rather than harm it.

Then as to defendants' requests refused, I was just in the course of checking them over, because not knowing in advance of the trial what course this case might take as to price and the like, we included instructions with regard to the whole case that perhaps no longer have to be treated as a necessary request. We consent to the rejection of defendants' request No. 13. We except to the refusal to

give defendants' request No. 15, because that is the only request for instruction in the case bearing upon the element of contribution of services, time, energy, skill, and expenses by Hermann, and putting him into the class of a joint adventurer and taking him out of the class of an employee.

We also except to the refusal to give defendants' request No. 16 upon the ground that that is the only request in the case and the only instruction bearing upon the subject of the test of participation in losses as well as in profits, and is the only request for instruction in the case telling the jury in consideration- [408] ing whether there should be a participation in losses to create either a partnership or a joint venture, that loss of time, travel, hotel money and the like would be a sufficient loss to meet that test.

We acquiesce in the refusal of defendants' request No. 22 because it is no longer needed at the conclusion of the case.

We acquiesce in the refusal of our request No. 23, similarly as to our 24 and our 25 and our 26 and our 27—you will note as we go along many of these drop out because we are no longer dealing with market value.

We acquiesce in the refusal of our request 29, dealing with outlay, because the plaintiff ended up without making proof of outlay. Similarly as to 30. We except to the refusal to give our request No. 32 in that in none of the requests on either side that you indicated you were going to give is there any

instruction to the jury upon this matter in the case.

The Court: What is it?

Mr. Naus: The matter of whether or not as to the Bercut wine, the labeling of it under their own label and starting out with that whether the Park, Benziger Company were starting out with a new venture, putting it in the field of speculation. We except to the refusal of that request because——

The Court: Isn't that covered by 31?

Mr. Naus: I will have to look at that.

The Court: I have had these instructions so long I want to be sure that I do not become confused.

Mr. Naus: It deals with the same field as 31, except 31 deals with the matter of speculation generally, but 32 deals with the more narrow question that the evidence deals with.

The Court: Isn't that dealt with generally? When you say [409] conjecture and speculation you have said everything you can about it.

Mr. Naus: I doubt it, because when we are dealing with a new business or a new branch of an old business, and the jury have the case given to them, knowing the court knows it could be found to be a new business or a branch of an old business, they may think they have been invited by the court to consider that they could grant damages.

The Court: Only in this sense, that they are engaged in the business of marketing or selling California wine. They were in the wine business. They imported wine. They sold whisky. They could be described as a new branch or a new venture related to California wines.

Mr. Naus: We will except to the refusal to give our request No. 32 in that in no other instruction and in no other request is the jury being instructed on the narrow question with respect to an attempt to claim expected profits in a new enterprise.

We except to the refusal to give defendants' request No. 34 in that in refusing to give that request the court is taking entirely out of the case the rule of *Hadley v. Baxendale* with respect to the knowledge or ignorance at the time of the contract of January 29th as modified by the modification of February 3, 1943 with respect to whether either or both of the Bercuts had knowledge or were ignorant at that time that if they thereafter did not deliver the wine it could not be obtained elsewhere; that we consider the jury is entitled to be instructed upon that subject. We know nothing in form or substance in the request as given in any way contrary to law, and by refusing that request the court is refusing to instruct the jury on that subject. [410]

We except to the refusal to give defendants' request No. 27 in that in refusing that request the court is refusing to tell the jury at all that they may take into consideration the freedom from hazard and responsibility and risk of the plaintiff that the non-performance by the defendant has afforded.

Mr. Brownstone: That is 37.

Mr. Naus: 37, yes. That that is the only instruction upon the subject, so far as I know, it is proper in form and substance, and by the refusal of that request No. 37 it would appear to us that the court

is refusing to instruction at all upon that subject. Now, as to the plaintiff's instructions given, turning to plaintiff's request No. 7, our exception to that is one that the court might possibly be willing to cure, because I notice in other instructions the court did cure it. It starts out: "You are instructed if you find defendants repudiated their contract." That assumes, of course, the contract was never terminated or canceled. I except to that in that that does not limit it to a repudiation of an uncanceled contract, and might lead to confusion. All I wish in that connection is to clarify it to the extent of saying you can only consider repudiation in connection with a contract which is found otherwise not to have been canceled.

The Court: What are you objecting to there, the use of the word "repudiate"?

Mr. Naus: No, to leave the instruction as written except in the second line before the word "contract," strike out the word "their" between repudiated and contract. Strike out the word "their" and insert—well, change the instruction to read, "a contract not terminated or canceled." I think the instruction is otherwise sound. [411]

The Court: The objection then is to the use of the word "their"?

Mr. Naus: No, the objection is to the instruction as a whole in so far as it assumes the contract was never terminated. If the jury are told—the jury can be told about repudiation. It says here, "You are instructed if you find defendants repudiated their con-

tract.” Well, that is confusing. They may have repudiated the contract in the sense of refusing to deliver any wine, but they may be justified in that refusal if the contract had been terminated or abandoned.

The Court: I do not know whether I can improve that or not. The trouble with these instructions is you can’t put everything into one instruction.

Mr. Naus: I grant that.

The Court: I ought to be able to do that. All right. What is next?

Mr. Naus: Before you pass that, may I say this: The only kind of contract that can be repudiated is one that is in force, and when you use the word “repudiated,” it excludes the idea of abandonment. If all members of the jury were scholars of the middle ages and trained in the law, they might follow that instruction. I can’t quite follow it, and I persist in the exception.

The Court: Very well.

Mr. Naus: We except to the giving of plaintiff’s instruction No. 3, the three opening lines of it, where it says, in its amended form: “I instruct you that the assignment of a contract transfers to the assignee all the right and title of the assignor.” We except to that in that there is an implication there that is given to the jury that the assignee takes only the rights [412] and benefits and does not take along with it any burdens.

The Court: The statement is correct, however.

Mr. Naus: Well, it is as correct as any half truth I ever saw.

The Court: Go ahead.

Mr. Naus: We except to the giving of plaintiff's instruction No. 5-E, in that it either misstates the record as to the fact or else it is abstract and not concrete. It says, "If by its terms the obligations of a written contract are expressly made binding upon the successors and assigns of the parties thereof"—Mr. Mitchell, may I have the contract? From that your Honor would be justified in supposing they read the contract and the contract read that way, when, as a matter of fact, to the extent that the words, "and assigns" are in that instruction, it is a false instruction. If you will read paragraph 11 of the contract you will find no basis in the record for it.

The Court: What is your exception?

Mr. Naus: My exception to the giving of 5-E, then, is that the jury in effect are told that the obligations of this contract were binding upon Park, Benziger by reason of the terms of the contract, itself, when, as a matter of fact, the instruction is contrary to the terms of the written contract, paragraph 11 of the written contract, and is also contrary to the record of this case, which contains nothing whatever to the effect that either the plaintiff company, or Park-Benziger, ever expressly assumed or agreed to perform the obligation of the contract.

The Court: I suppose I could read that portion of the contract to the jury.

Mr. Naus: But still that would not help, because the in- [413] struction, itself, is a misdirection to the jury.

The Court: I presume a lot of them are misdirections.

Mr. Naus: What I mean to say is, there you are in effect telling the jury because of something in this case—you are telling them as a matter of law Park-Benziger assumed obligations here, and there is nothing in the record to support it, and the only piece of the record they point to to support it turns out not to be supporting when you look at the piece, that is to say, that part of the contract.

The Court: Personally, I do not think it is important at all, whether it is in or out. Personally, I do not think it makes any difference whether I give it or whether I refuse it. However, I note your exception.

Mr. Naus: Now, we except to the giving of plaintiff's instruction No. 6, in that the instruction is in the nature of a formula and it excludes from the consideration of the jury in determining whether the plaintiff was entitled to performance whether or not any legal effect is to be given to the voluntary disablement of Louise Hermann by letting her license lapse on February 28th, and in effect tells the jury that the plaintiff was entitled to performance from the defendants whether Louise Hermann or Chateau Montelena of New York remained able to perform or not, contrary to the rule

for which we contend, that a mere assignment does not relieve the assignor of the obligations of the contract, but the assignor must remain able to perform.

We except to the giving of plaintiff's instruction No. 9, which under the state of circumstances excuse the plaintiff from performance when, as a matter of fact, the plaintiff is never excused from the duty of Louise Hermann to continue able [414] to perform by maintaining a license.

We except to the giving of plaintiff's instruction No. 12, which in the modified form starts out by reading, "To constitute an abandonment of a contract there must exist on the part of all parties concerned". We except to that on the ground that by instructing the jury in that form, a secret intention in the mind of one of the parties would be sufficient to satisfy the instruction, when the law is concerned not with a secret unmanifested intention, but is concerned with an intention manifested by the act of the parties, and in the context here, manifested by the apparent mutual intention of all the parties. We except to it on the ground that it permits the witness Elman, for example, to have had an unconstituted or unmanifested intention in his mind until Hermann signed, and then came out afterwards to say he never had any other intention.

We except to the giving of instruction 5-C in that it is abstract and would only tend to confuse the jury. If there be a joint venture here, as we think there is—but I say if there be one here, whatever transaction was entered into was not certainly en-

tered into on his own behalf alone. There is nothing in evidence here showing that once he assumed a joint venture that he performed some act on his own behalf alone.

We except to the giving of plaintiff's instruction 5-B to the extent that in there it says that one of the tests of a joint venture is the existence of an equal right on the part of each joint adventurer to direct and govern the conduct of the other. We except to it upon the ground that there may be a joint venture whether all the parties have a right or not, and in any event, even if the different parties have some right, the law does not require an equality of right. [415]

Also under the fourth element given by instruction 5-B, under the subdivision (d) it reads, "close and even fiduciary relationship between the parties," we except to it upon the ground that in that instruction 5-B the Court purports to give to the jury four elements of a joint venture, when a close or fiduciary relationship is never an element but simply is the result of a joint venture if the elements otherwise exist. So the Court is giving us an element something that is not an element at all.

We except to the giving of plaintiff's instruction No. 10 upon the ground, first, that it speaks of the plaintiff's ability or inability as being a matter of defense for a defendant. On the contrary, we say that in every case where a plaintiff sues for a breach of contract, one of the implications of his complaint and one of the elements of his position is

that he be at all times able to perform, and that shifts the burden that rests upon a plaintiff to make a showing of ability into a defense upon the defendant of a showing of inability.

We except to the instruction further upon the ground that regardless whether the burden is upon the plaintiff or upon the defendant the Court instructs the jury that it is not necessary for the plaintiff to have had ability to perform independently of the credit that would obtain by getting the wine through performance by the other party. And we except to the instruction on the further ground that the Court not only puts the burden of a showing of inability on the defendant, but makes that be tested by the presence or absence of insolvency. I submit the matter.

The Court: Mr. Olshausen, do you wish to reply to any of Mr. Naus' statements? [416]

Mr. Olshausen: The only thing I remember is his criticism of that instruction based on *Beck v. Cagle*, 46 Cal. App.(2d), which states the elements of a joint venture. I believe it is our instruction. It is one of the five lettered instructions, and I will say that instruction is quoted word for word from that case. When he criticizes it he is simply criticizing the case.

Mr. Naus: As a matter of fact, I criticize not the case, but I can say right now it is a first class lifting job of copying from the opinion, and I still except to it.

Mr. Olshausen: The others, I think, are only points which have been raised before.

The Court: I do not know whether I have overlooked anything or not.

Mr. Olshausen: I will say on that 50 percent instruction—that same point—I have looked at it again and it is worded in such a way that it sounds like a mandatory instruction. In the second place, on that question, where the plaintiff has to share in his recovery, and the point that is an out for the defendant, your Honor refused instruction 5. Perhaps there are formal objections to it. I won't go to instruction 5, itself, but I would like to call attention to these two cases at the bottom of instruction 5, and which apply to the same thing. They state the general law that I had in mind when I tried to take exception to that 50 percent instruction, that if the plaintiff was under duty to divide the recovery with another person who does not sue, that is a question purely between the plaintiff and the third person, and not a question for the defendant. I just call those two citations to your attention: One is *Russ v. Tuttle*, 158 Cal. 226; the other is [417] *Concordia Fire Insurance Co. v. Commercial Bank*, 39 Fed.(2d) 826.

The Court: The only instruction that I have not given you definite information about is that one with reference to partnership.

Mr. Olshausen: My information on the law is as I stated. Now, I could check Mr. Naus' statement that the *ultra vires* has been entirely abolished in California once more and I could either tomorrow morning or the first thing tomorrow morning——

The Court: Could you be here at half past nine?

Mr. Naus: We could determine that by looking at the code section right now.

The Court: Do you mean the California code?

Mr. Naus: Yes, the Civil Code. The Ballentine revision of 1931. They simply have done away with ultra vires as to a corporation on one side and a shareholder on the other, a shareholder and an officer. It is a family fight. It is no longer a part of the law.

Mr. Olshausen: As I say, I can check that, and if there is anything to add I can add it tomorrow morning.

The Court: Would it inconvenience you gentlemen if I ask you to come tomorrow morning at half past nine? Could you be here at half past nine?

Mr. Naus: I just happen to have—if I could make a deal with the Yellow Cab Company——

The Court: Make it ten.

Mr. Naus: I do not think it will take any more than a minute. I have said all I want to say about it.

The Court: Make it ten o'clock. Bring it up before the jury is brought into court. [418]

(An adjournment was thereupon taken until tomorrow, Tuesday, March 21, 1944, at 10:00 o'clock a.m.) [419]

Tuesday, March 21, 1944, 10:00 o'clock A. M.

The Court: Park, Benziger & Co. v. Bercut, on trial.

Mr. Olshausen: On this matter of the instruction that the plaintiff had power to enter into a partnership under New York law—that is No. 5(a)—I have looked at the code section 345, California Civil Code, and the law substantially construing it, or commenting on it, and I have come to the conclusion that our instruction is correct, and, consequently, we still keep the request. There is one other matter. It is that in case it is necessary for the record we state that the grounds upon which we have taken exception to the instructions refused or modified—we are of the opinion and take the position that the instructions as requested were correct statements of the law and supported by the evidence.

The Court: I shall refuse to give Plaintiff's Instruction No. 5(a) which refers to the matter you have just referred to. I received word from my secretary that the defendant wished to withdraw request No. 19.

Mr. Naus: I so informed your secretary, and I so informed Mr. Olshausen before court convened this morning. That is correct.

The Court: Request No. 19 is withdrawn.

Mr. Naus: Withdrawn.

The Court: Referring to the defense request No. 36, yesterday I stated that I expected to give that instruction. I now advise counsel that I will give the instruction, but I shall delete therefrom

the following: "And the burden of proof is on the plaintiff." That is the last clause or phrase in the instruction. You may have an exception to that, Mr. Naus, of course. [420]

Mr. Naus: No, I don't think so, your Honor, because I take it in your stock instruction you will deal with the burden of proof, so I take no exception to that deletion.

The Court: Very well. Defense request No. 35, I stated yesterday I expected to give that instruction. I shall strike from that instruction the last sentence. The last sentence reads: "In addition to those deductions you must also deduct the 50% selling commission which was to have been paid by the plaintiff to Serge Hermann because that would be clearly a selling expense of the plaintiff if Serge Hermann were only an employe or salesman on commission instead of a partner or joint adventurer."

Mr. Naus: If the Court please, I except to the refusal to give that instruction upon the ground that the instruction is a correct statement of the law as applied to the facts here, and the matter covered by that instruction the jury should know, because it goes to the heart of the case on the question of damages. Also, if the Court please, Rule 51 has never become entirely clear to me yet. It requires, of course, the judge to announce before the argument begins what the instructions are, but the exceptions may be taken before the jury retires to deliberate. With that in mind may we understand that all exceptions taken by me yesterday and this

morning shall be deemed to be renewed at the time the arguments conclude and before the jury retires?

The Court: In compliance with Rule 51.

Mr. Naus: Yes.

The Court: Yes.

Mr. Olshausen: Yes. Of course, if that is necessary, we would make the same request.

The Court: Yes. [421]

Mr. Naus: I don't know whether it is necessary; I am in doubt about it.

The Court: Well, I think it is just as wise to have an understanding about it. All exceptions taken by both parties apply under the provisions of Rule 51. Now, gentlemen, I think we will be in recess for five minutes, and then we will bring the jury in and we will start with the arguments.

(The arguments of respective counsel were then presented to the jury and an adjournment was taken until tomorrow, Wednesday, March 22, 1944, at 10:00 o'clock a. m.) [422]

Wednesday, March 22, 1944, 10:00 o'clock A. M.

The Clerk: Park, Benziger & Co. v. Bercut, et al.

The Court: Bring in the jury.

Mr. Bourquin: Mr. Naus called my attention to this morning that there may be various fictitious defendants—well, here is the jury.

The Court: I suppose what you wish is an order entered dismissing as to all fictitious defendants?

Mr. Bourquin: Yes, your Honor.

The Court: The Clerk will make that entry.

CHARGE TO THE JURY

The Court (Orally): This is an action between Park, Benziger & Co., Inc., a corporation, as plaintiff, and Pierre Bercut and Jean Bercut doing business as P. & J. Cellars, defendants. The action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendants' contract.

You are instructed that if you find that the defendants repudiated their contract with plaintiff either by telling plaintiff that they would not perform or by acts inconsistent with defendants' continued performance of their obligation under the [423] contract, then the plaintiff may sue immediately for breach of the contract.

The defendants Bercut admit that they did not deliver any of the wine mentioned in the contract, and they defend on the ground that the contract was canceled or terminated by mutual abandonment on April 27, 1943.

It is the duty of the Judge to instruct you as to the law that is applicable to this case, and it is your duty, as jurors, to follow the law as given to you in these instructions.

I charge you that it is your exclusive province to determine the facts in the case, and to consider the evidence and value of the evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfies your minds; in other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds, as against a lesser number whose testimony does satisfy your minds.

The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even though a number of witnesses on the other side might testify to an opposite state of facts, if, from the whole case, the jury believes that the greater weight of the evidence considering its reliability and the credibility of the witness is on the side of the one witness as against the greater number of witnesses.

In civil cases a preponderance of evidence is all that is required, that is, such evidence as, when weighed with that opposed to it, has more convincing force. [424]

In weighing the evidence you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. For the purpose of determining the credibility of the witnesses you may take into con-

sideration their conduct; their character, as shown by the evidence; their manner on the stand; their relation to the parties, if any; their interest in the case; their bias and prejudice, if any; their degree of intelligence; the reasonableness or unreasonableness of their statements; and the strength or weakness of their recollection. A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of his testimony, or his motives, or by contradictory evidence.

A witness false in one part of his testimony is to be distrusted in others; and if you are convinced that a witness has wilfully sworn falsely as to a material point, you must treat all of his testimony with distrust and suspicion, and reject it all unless you shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

You should not consider as evidence any statement of counsel made during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court; such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inferences which you may deduce therefrom, and such presumption as the law may deduce therefrom as stated

in these instructions, and upon the law as [425] given you in these instructions.

If you find that evidence has been suppressed, you may infer that it would be adverse if produced.

I instruct you that the contract between Chateau Montelena of New York and the defendants, dated January 29, 1943, and modified by letter dated February 3, 1943, was a contract for the sale of merchandise in the ordinary course of business, the assignment thereof was not prohibited by statute nor by the contract itself, and that said contract was assignable.

I instruct you that the assignment of a contract transfers to the assignee all of the right and title of the assignor in the contract.

You are instructed that the Chateau Montelena of New York assigned the contract dated January 29, 1943 between Chateau Montelena of New York and Pierre Bercut and Jean Bercut doing business as P. & J. Cellars, to the plaintiff, Park, Benziger & Co., Inc.

The law does not require an assignment to be in any particular form.

If by its terms the obligations of a written contract are expressly made binding upon successors and assigns of the parties thereto, no express assumption of those obligations by an assignee thereof is necessary.

The court instructs you that when the assignor of a contract has performed or offered to perform all the requirements of said contract imposed upon

him prior to the assignment, and that thereafter the assignee has performed or offered to perform all the requirements of said contract imposed upon him, the assignee is entitled to performance of the contract from the other party. [426]

If you find that the assignor Chateau Montelena of New York performed or offered to perform all the requirements of the contract of January 29, 1943, on its part prior to the assignment thereof, and that after said assignment, the plaintiff, Park, Ben-ziger & Co., Inc., performed or offered to perform on its part all of the requirements of the contract dated January 29, 1943, and that the contract was not terminated, you should find that the said plaintiff was entitled to performance from the defendants.

The court instructs you that when one party to a contract notifies the other party that he will not perform the obligations of the contract, this repudiation excuses further performance by the other party.

If you find that on or about the 27th day of April, 1943, the defendants repudiated the contract of January 29, 1943, and refused to perform said contract, you should find that the plaintiff was excused from further performance.

You are instructed that an offer of substantially different terms from those in the contract between the parties, stated with the intention not to perform the original contract, constitutes a repudiation of the contract by the party making said offer.

If you find that the defendants offered to plaintiff

“three cars for cash” and other cars to be decided upon later, if at all, with the intention not to proceed with the original contract, and if you find that the original contract was not abandoned, you will find that the defendants repudiated and breached their contract with the plaintiff.

Defendants claim that the contract involved in this case was abandoned by mutual consent of the defendants and the plaintiff. You are instructed that abandonment is an affirmative [427] defense and that the burden of proving the same by a preponderance of evidence rests upon the defendants.

A contract can be mutually abandoned by the parties before performance begins or at any stage of their performance and each of the parties released from any further obligation on account of such contract. The contract may be abandoned by a written agreement or an oral agreement, or an agreement or undertaking partly in writing and partly oral. The fact of such abandonment can be established by evidence of the acts and declarations of the parties. If you find that on or about the 26th and 27th days of April, 1943, Serge Hermann and plaintiff and the defendants herein mutually agreed to terminate or abandon the contract, plaintiff's Exhibit No. 2, then, and in such event, your verdict should be for the defendants.

To constitute an abandonment of a contract there must exist on the part of all parties concerned an actual intent to abandon together with unequivocal, positive acts inconsistent with continued performance of the contract.

If you find that the circumstances show no actual intent on the part of the plaintiff, Park, Benziger & Co., Inc., to abandon said contract of January 29, 1943, then you should find against the defendants on the alleged defense of mutual abandonment.

The inference of abandonment may arise either from a single act or from a series of acts. The question is whether there was an abandonment, not whether it is evidence by one act or by many.

When a contract has been once mutually abandoned, it cannot thereafter be revived or restored to life by one of the parties alone because he changes his mind, even though the change [428] of mind may occur in the next minute or hour or day after the mutual abandonment occurred. If you find from the evidence that the contract of January 29, 1943, was mutually abandoned by all parties at the moment that Serge Hermann signed and delivered the paper of April 27, 1943, then I instruct you that the contract could not be thereafter revived or restored to life without the assent or consent of the Bercuts.

The evidence shows that "Chateau Montelena of New York" was simply a business or trade name adopted or used by the wife of Serge Hermann in connection with the wine contract with the Bercuts, and that Serge Hermann had complete and entire charge of the business dealings under the name of Chateau Montelena of New York. I therefore instruct you that for the purposes of the present lawsuit you are to consider Serge Hermann and Cha-

teau Montelena of New York as one and the same, and the act or conduct of either as the act or conduct of the other, and any mention of either in these instructions shall be deemed to include the other or both.

The evidence shows that the paper of April 27, 1943 was signed only by Serge Hermann. You must therefore consider and determine the relationship between Serge Hermann and the plaintiff, Park, Benziger & Co.

The cancellation or termination writing or paper of April 27, 1943, is signed by defendants Bercut and by Serge Hermann for Chateau Montelena of New York, the same parties who were the parties to the original contract of January 29, 1943. If you find from the evidence that on April 27, 1943, when the writing or paper of that date was signed Serge Hermann was a joint adventurer with the plaintiff, Park, Benziger & Co., and that he signed on behalf of the joint venture, then I instruct you that [429] under the circumstances of this case the plaintiff was bound by Serge Hermann's act and signature in signing on April 27, 1943, and your verdict should accordingly be in favor of defendants Bercut.

Transactions which one joint adventurer makes on his own behalf alone do not bind the other joint adventurers.

To constitute a joint adventure, there must be at least (a) a community of interest in the object of the undertaking; (b) an equal right to direct and govern the conduct of each other with respect there-

to; (c) share in the losses if any; (d) close and even fiduciary relationship between the parties.

Each one of two or more joint adventurers has power to bind the others in matters within the scope of the joint enterprise, in dealings with third persons, regardless of any limitations or authority that may have been agreed between the joint adventurers, if the third person is unaware of the limitation of authority at the time of acting.

The plaintiff, Park, Benziger & Co., claims that Serge Hermann was merely employed by it as an employee or salesman working on a commission of 50% of net profits. The defendants Bercut claim that Park, Benziger & Co. and Serge Hermann were either partners or joint adventurers in the matter of the Bercut wine. If, as plaintiff claims, Serge Hermann was merely an employee or salesman, then Park, Benziger & Co. would not be bound by Hermann's act in signing the paper of April 27. However, if as the defendants Bercut claim, Hermann was either a partner of, or joint adventurer with, Park, Benziger & Co. in the matter of the Bercut wine, then you might infer from the whole of the evidence that Park, Benziger & Co. were bound by the act of Hermann in signing the paper of April 27. [430]

A partnership is an association of two or more persons to carry on as co-owners a business for profit.

A joint adventure is something like a partnership but is not identical with it. A joint adventure is an

association of two or more persons or corporations to carry out a single business enterprise for profit. It is usually although not necessarily limited to a single transaction, although the business of conducting it to a successful termination may continue for a number of years. The name "joint adventurer" is applied to those special combinations of two or more persons or corporations, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation.

In considering whether or not a relationship such as that of joint adventurers or partners has been created, the law is guided in part by the acts of the parties, and is not limited to their spoken or written words.

In determining whether or not there was a joint adventure, you shall not fasten your attention upon any one paper or any one term of a paper or any one act alone to the exclusion of everything else. You should consider the whole scope of the arrangement and each part of it should be considered in relation to all other parts. Look at the arrangement as a whole.

I further instruct you that in this lawsuit the question is not merely whether there was a joint adventure as between Serge Hermann and the plaintiff, but whether as between them on one side, and the defendants Bercut on the other, there was one; and in such situation the relationship of joint adventurers may be determined by you from the apparent purposes and the acts and conduct of Hermann, Elman and Benziger, because the law says

that the acts and conduct of parties may speak above their ex- [431] pressed declarations to the contrary.

Of course, the wages or compensation of a mere employee or salesman may be measured by a percentage of the profits of a business, but in determining whether there was a joint adventure you may inquire whether the person who renders or is to render the services is himself the promoter or an original party to the enterprise. If you find from the evidence that Serge Hermann was the promoter of the whole enterprise, and the original party to it, you are at liberty to infer that he was a joint adventurer rather than a mere employee or salesman.

I instruct you that the defendants have raised the defense of plaintiff's alleged inability to pay for wine which the plaintiff purchased under the contract. You are instructed that the defendants were not justified in repudiating the contract unless the plaintiff were actually insolvent. The burden of proving such a defense is on the defendants. You are instructed that no evidence has been offered tending to show that the plaintiff is or ever was insolvent. Mere doubts of the solvency of the other party afford no defense to the party who refuses to perform the contract according to its terms because of such suspicion.

With respect to the occurrences on April 26 and 27 in 1943 one of the two results is true: either the original contract of January 29, 1943, was cancelled or terminated by mutual abandonment when

the paper of April 27, 1943, was signed and delivered, or else it was repudiated by the defendants Bercut. If you find that there was such a termination on April 27, then your verdict must be in favor of defendants Bercut, and there is no need for you to consider anything further. If you find that instead of such termination there was a repudiation of the [432] original contract, then your verdict should be in favor of plaintiff, Park, Benziger & Co., and accordingly you would need to consider how to measure the amount of damages suffered by it.

I will instruct you on the subject of the measure of damages because it is my duty to instruct you as to all the law that may become pertinent to your deliberations. I, of course, do not know whether you will need the instructions on measuring damages, and the fact that I give them to you must not be considered as intimating any views of my own on the issue of liability or as to which party is entitled to your verdict. It is for you to determine from the evidence whether the plaintiff was bound by the agreement of termination or cancellation dated April 27, 1943. If it was, your verdict should be in favor of defendants Bercut. If plaintiff was not bound, then you will be guided by the instructions as to how to measure the amount of plaintiff's damages.

Although the agreement dated January 29, 1943, purports to be for the sale of 60,000 cases of wine, a price is fixed for only 26,691 cases and the price for the remainder of 33,309 cases was left to be

determined by future negotiations which never took place. Under such circumstances the contract must be treated as one for the sale of only 26,691 cases. If you find that plaintiff is entitled to recover, you will ascertain the damages, if any, suffered by him on the basis of a contract for the sale of only 26,691 cases of wine.

I instruct you that the evidence before you is insufficient to show that the goods were obtainable elsewhere, that is, it is insufficient to show an available market. On the contrary it shows no available market. The rule in such case is that the measure of the buyer's damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach [433] of contract, which rule as specifically applied to this case now before you means that, if you find there was a breach, either (1) the amount of the buyer's outlay of expense in the course of preparing to carry out the contract before he knew that the seller would not perform, or (2) the net profits, if any, that the buyer was reasonably certain to have made if the seller had performed the contract.

In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to determine net profits, I instruct you that you cannot in any event use a greater markup by plaintiff over the cost to it than the markup permitted under OPA regulations as a price ceiling.

The term "profits," as I use it in these instructions, does not mean gross profits. "Gross profits" are really not profits at all within the contemplation

of the law, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. If a buyer is entitled to an award at all because of loss of profits, the award must be confined to net profits. "Net profits" are the gains from sales after deducting the expenses of doing business, together with the interest on the capital employed.

Even though the law lays down the rule that in case of a seller's breach of an obligation to deliver goods not obtainable elsewhere the buyer's damages may be measured by his loss of profits, nevertheless the buyer must make proof showing that it was reasonably certain that the profits would have been made. Guesswork or conjecture or speculation cannot be used as a substitute for proof. That is not peculiar to the law of sales alone, but is applicable to all civil actions for damages for [434] breach of contract. Not only must the plaintiff prove the breach, but he must also prove the damages by a sufficiency of evidence as distinguished from guesswork or conjecture.

I instruct you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on 26,691 cases of wine, and you find that

said profit could reasonably have been expected, and if your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding the amount of such profit.

In the instructions I have given you thus far I have given you the general rules for measuring damages. I further instruct you, however, that a buyer who claims damages from a seller for non-delivery of the goods is always under a duty to minimize or mitigate his damages, that is, to keep them down if reasonably possible. There is conflicting testimony before you as to the amount of wine offered by Jean Bercut to plaintiff immediately after the cancellation agreement of April 27, 1943, was signed and delivered. If you find that he then offered to plaintiff only three carloads of the same wine for cash but otherwise at the contract price and terms, then you cannot award plaintiff any lost profits on those three cars, aggregating approximately 4500 cases, because plaintiff's duty to keep his damages down exists even though the Bercuts were the only source whence the wine could be obtained. The 26,691 cases covered by the contract must accordingly be reduced to the extent of the three carloads or approximately 4500 cases.

[435]

If you find that immediately after the cancellation agreement of April 27, 1943, was signed and delivered, Jean Bercut offered to the plaintiff not merely three carloads but all of the 26,691 cases of wine on hand at the prices stated in the contract,

but for cash in advance, then in that event I instruct you that regardless of whether or not other wine was available elsewhere in the market, you cannot award to plaintiff any damages because of a market price in excess of the contract price, nor any damages because of loss of anticipated profits. The only damage to plaintiff through paying cash in advance would be limited to interest for the use of the money for the short period of time between the date of cash payment in advance and the time of arrival of the wine at destination thereafter when the plaintiff would otherwise have been required to pay the draft attached to the bill of lading for each carload.

In arriving at your verdict you must not resort to the determination of chance; that is, you must not arrive at your verdict by dividing by twelve, or any other number, the sum of the various amounts at which each of you would fix the verdict and then take the quotient as the verdict.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action. It is the duty of the jurors to deliberate and consult with a view to reaching an agreement, if they can do so without violence to their individual judgment upon the evidence under the instructions of the court. Each juror must decide the case for himself or herself, but should do so only after a consideration of the case with fellow jurors, and a juror should not hesitate to change his or her views or opinions on the case when convinced that they are erroneous. No

juror should vote [436] for either party, nor be influenced in so voting, for the single reason that a majority of the jury should be in favor of such party. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict solely because of the opinion of the other jurors. Your verdict must be unanimous.

There have been prepared for your convenience two forms of verdict; the first, after the entitlement of court and cause, reads as follows: "Verdict. We, the jury, find in favor of the plaintiff and assess the damages against the defendants in the sum of (blank) dollars." Then there is a place for the signature of the foreman. The second form reads as follows, after the entitlement of court and cause: "Verdict. We, the jury, find in favor of the defendants," and then follows a blank space for the signature of the foreman.

When you have arrived at your verdict, if you find in favor of the plaintiff the foreman will fill out the form I have described and write therein the amount of damages you have found, and after the verdict has been arrived at the foreman will sign the verdict and you will be returned to court, where it may be delivered.

The jury may now retire.

Mr. Bourquin: Your Honor, may I address your Honor under the Rule 51 to complete our record? I desire to add an additional objection and exception to the charge, and to the instruction which

your Honor has modified, since the agreement with respect to the exceptions and as modified was given. The plaintiff desires to assign as error the giving of the instruction which I take it is defendants' No. 36 as modified and as given, wherein that in- [437] struction assumes that the O.P.A. regulation or ceiling affected plaintiff's resale price.

The Court: Yes.

Mr. Bourquin: We make the objection upon the ground that there is no evidence or proof of the application of such a regulation to the prices in question upon the plaintiff's part, and the evidence of Elman is uncontradicted that the suggested August, 1943 markup regulation did not affect prices theretofore established, and upon the further ground that the price for resale of this wine was fixed and established in April and May, 1943.

The Court: I regret the necessity for mentioning that at this time. I thought we had devoted most, or the greater part, of Monday to a discussion of the instructions and hearing exceptions in that regard.

Mr. Bourquin: Because, your Honor, my associates advise me that the proposed form of instruction which I now object to was not the subject of objection before, that the instruction as now given was not the form proposed but was another form, and there has been apparently a modification to meet the objection that was made, but this objection is not in the record.

The Court: I announced yesterday morning, I

think it was yesterday morning, that I had modified that instruction in certain particulars by striking out the last clause of it. That was the only change that was made in it, the only modification that was made in it. Do you wish to say anything, Mr. Naus?

Mr. Naus: I submit the matter. I will say nothing at this time, because it was fully covered by stipulation yesterday. This is in violation of it.

The Court: That is my understanding of it. The jury will now retire. [438]

(The jury retired at 11:00 a. m., and at 2:25 p. m. court was convened in the absence of the jury.)

The Court: I received a request from the jury which reads as follows: "Please get us copy of O.P.A. price regulation on retail and wholesale prices effective sometime during August, 1943."

I set aside Monday, March 20th, for the purpose of considering instructions to the jury in accordance with the provisions of Rule 51 of the Federal Rules of Civil Procedure. At that time I undertook to inform counsel of my proposed action upon the requests prior to their arguments, in accordance with the provisions of that section of the code. I now ask the reporter to read the record in reference to defense request No. 36.

The Reporter (reading): "The Court: I am giving defense request No. 36."

Sometime subsequent: "Mr. Olshausen: The next is 36. We except to that because it puts the burden on plaintiff of proving the O.P.A. limitations on their own case." Mr. Olshausen read the instruction.

The Court: I am wondering if the instruction as read by Mr. Olshausen ought not to be placed in the record. It reads as follows:

“In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to determine net profits, I instruct you that you cannot in any event use a greater markup by plaintiff over the cost to it than the markup permitted under OPA regulations as a price ceiling; and the burden of proof is on the plaintiff.” [439]

Proceed.

The Reporter (reading): “Now, it is not clear just the burden of proof of what, but it sounds as if he is saying you have to prove the O.P.A. maximum, and I do not believe that is part of the plaintiff’s case.”

The Court: Was anything said by Mr. Naus in reply to that?

The Reporter: No, sir.

The Court: What happened the following morning, Tuesday morning, March 21, with reference to that defense request 36?

The Reporter (reading): “The Court: Referring to the defense request No. 36, yesterday I stated that I expected to give that instruction, but I shall delete therefrom the following: ‘And the burden of proof is on the plaintiff.’ That is the last clause or phrase in the instruction. You may have an exception to that, Mr. Naus, of course.

Mr. Naus: No, I don't think so, your Honor, because I take it in your stock instructions you will deal with the burden of proof, so I take no exception to that deletion."

The Court: Now, will you read, please, what Mr. Bourquin said this morning with reference to that same matter?

The Reporter (reading): "Mr. Bourquin: Your Honor, may I address your Honor under the Rule 51 to complete our record? I desire to add an additional objection and exception to the charge, and to the instruction which your Honor has modified, since the agreement with respect to the exceptions and as modified was given. The plaintiff desires to assign as error the giving of the instruction which I take it is defendants' No. 36 as modified and as given, wherein that instruction assumes that the O.P.A. regulation or [440] ceiling affected plaintiff's resale price.

"The Court: Yes.

"Mr. Bourquin: We make the objection upon the ground that there is no evidence or proof of the application of such a regulation to the prices in question upon the plaintiff's part, and the evidence of Elman is uncontradicted that the suggested August, 1943 markup regulations did not affect prices theretofore established, and upon the further ground that the price for resale of this wine was fixed and established in April and May, 1943."

The Court: What did I say?

The Reporter (reading): "The Court: I regret the necessity for mentioning that at this time. I thought we had devoted most, or the greater part, of Monday to a discussion of the instructions and hearing exceptions in that record."

The Court: In that regard, I suppose.

Now, gentlemen, my recollection is that Mr. Bourquin was not here at the time on Monday when I mentioned defendants' request No. 36. My recollection is that Mr. Bourquin had asked to be excused and had left the court-room when that instruction was under consideration. Is my recollection correct?

Mr. Bourquin: That is mine, your Honor. That is in accord with my recollection.

Mr. Naus: That is correct.

The Court: He was not present. Now, it seems to me that the objection that was made this morning was not timely. It was not proper. It was not in accordance with the provisions of Rule 51. It was not within the provisions of the rule. But we are confronted now with a situation here of having the jury [441] request the court to give the testimony with reference to this O.P.A. regulation. Now, it may be that I ought to have instructed the jury that the burden of proof was upon the plaintiff to offer proof of the provisions of the O.P.A. I was influenced by the objection that was made by the defendants in that regard. I thought that perhaps

I ought not to require or to place the burden on the defendants to make that proof——

Mr. Bourquin: You mean the plaintiff, your Honor?

The Court: Yes. Maybe I ought not to have done that. Maybe I was in error in striking out that clause. Now, I take it you both agree there is no evidence here as to what those prices were.

Mr. Naus: No, I do not agree with that, your Honor. May I refer to the record?

Mr. Bourquin: I wouldn't go that far.

The Court: There is no evidence here as to what the O.P.A. regulations were as to price ceilings.

Mr. Naus: May I point to the record?

The Court: Yes.

Mr. Naus: I would like to make just two comments: First, with respect to the state of the record under Rule 51, the record is complete and accurate as far as the reporters have read it back. But there was another objection at another stage in it that I am sure they have in their notes. At the conclusion of that session on Monday, the 21st, when each of us had taken all the exceptions that we desired, I arose and suggested to the court that there was some doubt in my mind as to whether under Rule 51 the parties had made a sufficient taking of exceptions by taking them on Monday, or whether we would be required to repeat them in the presence of the jury; so in effect, by [442] colloquy between your Honor, Mr. Olshausen and myself, it was agreed that the taking of exceptions at the conclusion of the Monday afternoon session should be

complete and be deemed to cover the exceptions taken just before the retirement of the jury, so that we have not merely this rule, but we have the acquiescence.

The Court: The thought being that it would not be necessary to repeat them again before the jury retired.

Mr. Naus: The thought went even deeper. The thought was we had our full opportunity in court that day to take any exceptions we chose.

The Court: That was my idea of it.

Mr. Naus: That is what I understood I was doing. Secondly, passing from that, I point to page 179 of the transcript as typewritten by the reporter, the question beginning at line 11 and the answer given at line 18, and if your Honor desires, I will be glad to read it.

The Court: Read it.

Mr. Naus (reading): "Mr. Bourquin: Before you testify to that——

"The Witness: If I have been qualified as an OPA expert, maybe I will get a job.

"Mr. Naus: No, I am not trying to qualify you as anything—as an expert in that respect. I am merely meeting on cross examination what you purport to say on direct examination, Mr. Elman. At that I think you are doing as well as many of them down at the OPA, as I have observed them. I am asking you whether you know that in the month of August 1943, beginning then and continuing ever since, you

have been under an OPA ceiling of 25 per cent in your [443] markup. A. Yes."

The Court: What line is that?

Mr. Naus: Line 18 on page 179.

The Court: What volume is that?

Mr. Naus: It is the second volume. The day is March 16th.

The Court: I remember that testimony.

Mr. Bourquin: May I read the rest of that, your Honor, the rest of that testimony? May I borrow that copy of the transcript? I did not bring mine up.

Mr. Naus: Surely.

Mr. Bourquin: Immediately following that, Mr. Naus continued to question the witness and he said:

"Q. So that had this contract been carried out, under these price lists or anything else, for three months, beginning with the fourth car and continuing under this contract, you could in no event have sold at a greater markup than 25 per cent; now, you know that, don't you?"

"A. No, I don't think so. At least, my understanding of it would be that since our price was established prior to this one, the price fixing of the merchandise took place before this law came out and subsequent to that. It differentiates—it says anything you purchase from this time on shall be at a fixed mark-up. Our contract and purchase of the wine happened prior to this. We had already established an

OPA price on that merchandise. I doubt very seriously whether this would have meant a retention in price. So far as I am concerned, I don't believe it would have. We would have kept the same prices."

The Court: What page is that? [444]

Mr. Bourquin: 179, and what I read began at line 19 and ran to 180, line 3.

The Court: Mr. Naus started at line 11.

Mr. Bourquin: Mr. Naus started at line 11.

The Court: You read from line 11 to what?

Mr. Bourquin: To 180, line 3 inclusive.

The Court: Will counsel stipulate that I may send a note to the jury, the foreman of the jury, calling their attention to Volume 2 of the transcript of testimony, page 179, beginning at line 11 and continuing to and including line 3 of page 180?

Mr. Bourquin: Plaintiff will, your Honor.

Mr. Naus: Yes, and I might also add, if the Court please, in that connection——

The Court: Listen. You stipulate to that?

Mr. Naus: Yes.

The Court: Anything else you say to me you are talking to me, of course.

Mr. Naus: Yes, your Honor. But in connection with that, and having in mind that, I stipulate that any part of the transcript, including that part, that part alone, or any other part your Honor desires, may go to the jury.

The Court: May I send all the transcript of the testimony that I have to the jury?

Mr. Bourquin: Yes, your Honor.

Mr. Naus: Yes, your Honor.

The Court: I haven't made any marks in it.

Mr. Naus: We wouldn't care about that.

The Court: Well, I haven't.

Mr. Naus: I merely want to add in this connection the view [445] of the defendant with respect to the present situation. It is our position, and I believe the law to be, that as to these regulations that have been published in the Federal Register, the regulations of a government agency, the Court has judicial knowledge of.

The Court: I do not think there is any doubt about that.

Mr. Naus: With that in mind I think, if the Court please, that in connection with that, and having in mind that anything the Court judicially knows the whole branch of the Court knows, the Court can have its recollection refreshed or can choose of its own motion to bring judicial matters to the attention of the jury.

The Court: I think I could bring the jury in.

Mr. Naus: At this time, if the Court please, I have with me the original regulation as to that 25 per cent markup. It is designated NPR445, dated August 9, 1943. I will ask Mr. Mitchell to hand it to your Honor, and I will ask Mr. Brownstone, who has a copy of it, and who is more familiar with that than I, myself, and who has studied it, to point out any part your Honor wishes brought to your attention or make any statement concerning it which you wish to hear.

The Court: I wonder if it would not confuse the jury if we sent this in to them, or whether it wouldn't be better to call their attention to the testimony in the transcript and let it go at that? If the jury is still in doubt about the matter and wishes further instructions, we have this bulletin which we can refer to, and if necessary I can read to them on the subject. I do not think it is necessary, in view of the stipulation, to send this in.

Mr. Naus: In that connection, and having that in mind, we [446] feel confident of our position as to judicial knowledge of the law, and the application here, we think the regulation is perfectly clear on the subject——

The Court: If you will just mark that——

Mr. Naus: (continuing) ——and we would suggest that, in accordance with your judicial knowledge of the regulation in question, that you, under the circumstances, give to the jury an additional or special instruction stating to them that beginning as of August 9, 1943, and continuing down to the present time there is a percentage markup maximum of 25 per cent on the sale by Park-Benziger of this wine to anybody, either wholesaler or retailer, or to anyone, not for consumption.

The Court: I will not do that at this time, Mr. Naus.

Mr. Naus: Very well.

The Court: But if there should be any further request from the jury upon the subject, I will entertain a request from you in that regard.

Mr. Naus: Very well.

The Court: But I should like to be fully advised as to what this bulletin contains so that I may intelligently speak to the jury about it.

Mr. Naus: Do you wish to defer that, or take it up now?

The Court: I think you had better prepare something so if called upon later for something additional, I can give it to them.

Mr. Naus: I believe Mr. Brownstone has already typed something on it, but it may be longer than your Honor needs.

Mr. Brownstone: This is our memo (handing a document to the court).

The Court: I do not know whether the other side would be [447] willing to stipulate in that regard. If they are, then that would shorten the matter.

Mr. Naus: I believe Mrs. Herzig has had some connection with the O.P.A. She should know.

Mrs. Herzig: I know there are other regulations than this one, Mr. Naus. For example, the General Maximum Price Regulation; and I do not feel that the jury would be helped by this.

Mr. Naus: All I am interested in, Miss Herzig, is this: There may be memorandums, bulletins, or what-not from time to time, but there never has been any change since that date of August 19, 1943 in the maximum mark-up of 25 percent in a sale of domestic wine by a wholesaler to either another wholesaler or to a retailer.

Mrs. Herzig: That, in itself, Mr. Naus, is a change from a prior regulation.

Mr. Naus: Granted. I say that it took effect August 9, 1943. I grant you previous to that it was different, but I am saying beginning August 9, 1943 down to the present date there has never been any change in that basic ceiling or maximum of a 25 percent mark-up on domestic wines sold by a wholesaler to either another wholesaler or to a retailer.

Mrs. Herzig: It is my impression, although I do not suppose it is an authority on this regulation, that if the price was approved by OPA prior to this date, that price still prevails.

Mr. Brownstone: I will state in answer to that, Mrs. Herzig, I have gone into all these regulations very carefully, and that is just not so. Your 25 percent limitation applies to anything.

Mrs. Herzig: That is not my impression, and you people ques- [448] tioned Mr. Elman when he was on the stand and then produced nothing to controvert his testimony.

The Court: It may be that any proof in regard to that should have been given by the plaintiff.

Mr. Naus: I am firmly of that view.

The Court: It seems to me, listening to what Mr. Olshausen had to say about that, I was justified in striking out that clause or sentence in which I said that the burden is on the plaintiff. There isn't any question but what the Court may take judicial knowledge of the practice with reference to the OPA or any regulations which have been adopted in conformity with or in accordance with the provisions of the statute. So if there is any further question

from the jury with reference to this matter, it will be necessary for the court to look into the provisions of the statute and the regulations of the OPA and determine what it shall instruct the jury upon that question, and such instruction, of course, would be based upon the judicial knowledge of the court in that regard.

My thought is if it is possible to shorten the matter, I think counsel should do it—and when I say shorten it, I mean rather than have the court read lengthy provisions of the statute, the regulations, you could agree as to what the law is, it might be better for all parties concerned. However, I have your stipulation as to what I shall say to the jury with reference to the testimony that has been given upon the matter, and I shall instruct them accordingly.

Mr. Naus: You still have that copy of the regulation up there?

The Court: Yes, I have.

Mr. Naus: Can your Honor turn to—well, let us see—these pages do not seem to be numbered. Oh, in small type down below in [449] the right hand corner, this says “Page 7.”

The Court: Yes.

Mr. Naus: The third column on the right on that. You will find it says Section 5.4.

The Court: Yes.

Mr. Naus: Maximum prices for wholesalers.

The Court: Yes, I have it.

Mr. Naus: Generally, and then under that 1, 2, and then we come to B.

The Court: Yes.

Mr. Naus: Now, it is B that controls us—initial maximum prices—and then below that, down at the end of the text on B, you find a tabulation in small Roman numerals I, II and III. The small Roman II is your mark-up: 1.25 times the cost. That is a 25 per cent mark-up.

The Court: 1/25 of what?

Mr. Naus: It is $1\frac{1}{4}$ times the cost mentioned in the text. Going back to B, there, reading it:

“A wholesaler’s initial maximum price per case to retailers shall be his net cost per case figured according to section 523 in his latest base purchase of the item, or if he made no base purchase of the item since March, 1942, his net cost per case figured according to section 523 for his most recent purchase of the item from any supplier, except from another wholesaler, multiplied by the percentage mark-up for the item being priced as follows: 2: 1.25 for wine.”

That is the way they write their percentage mark-ups. It is $1\frac{1}{4}$ times the price, which means add 25 percent to the original and you get $1\frac{1}{4}$. [450]

The Court: Yes.

Mr. Naus: If you desire to explore that backwards to the other sections you will find they talk about hard liquors, they talk about importing, all that having no relation to this, but you will find in the regulations as a whole, on a sale by a wholesaler to another wholesaler or to a retailer, in either event

it not being a sale for drinking, for consumption, that where such a sale is made, you can't charge more than the mark-up of 25 percent for wine.

Mrs. Herzig: I should like to call your Honor's attention to Article IV of this regulation, on page 6, Maximum price for sales of packaged domestic wine by processors. Mr. Elman, of Park, Benziger & Co., tells me that since this merchandise would be labeled P & B Brand, would bear his company's label, that he comes within the class of a processor. Now, I believe that is sound, his contention is correct, and under that section it states——

The Court: Article what?

Mrs. Herzig: Article IV on page 6 at the bottom of the first column on the left-hand side.

The Court: Oh, yes, I see it.

Mrs. Herzig: He tells me that this regulation states:

“Until further provisions of Article IV. are issued and become effective, maximum prices for sales or offers to sell packaged domestic wine by processors are to be determined according to the provisions of the General Maximum Price Regulation or Price Supplementary Regulation No. 14 issued by the Office of Price Administration as may be applicable.”

It is his understanding that that is where he comes in [451] and under the General Maximum Price Regulation, the March 1942 price is the ceiling price.

Mr. Brownstone: If the Court please——

The Court: I do not want to hear any further argument on the matter, gentlemen. If I do I will call upon you.

(At 4:05 p. m. the jury returned into court with a verdict in favor of the plaintiff and fixing plaintiff's damages in the sum of \$72,687.50.)

The Court: Do you wish to have the jury polled?

Mr. Naus: No, your Honor. May we have a 30-day stay?

The Court: Yes. Ladies and gentlemen, you are excused until further notice. You may now retire.

[Endorsed]: Filed April 7, 1944. [452]

[Title of District Court and Cause.]

ORDER

Ordered:

1. The motion for judgment under Rule 50(b) FRCP is denied;
2. The motion for new trial under Rule 59 FRCP is denied.

Dated: April 8, 1944.

A. F. ST. SURE

United States District Judge

[Endorsed]: Filed Apr. 8, 1944. C. W. Calbreath, Clerk. [453]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above-named defendants hereby appeal to the Circuit Court of Appeals, Ninth Circuit, from the judgment entered against them in the principal amount of \$72,687.50, based upon the verdict entered on or about the 22nd day of March, 1944, and from the whole of said judgment.

GEO. M. NAUS

LOUIS H. BROWNSTONE

Attorneys for said Defendants

[Endorsed]: Filed May 4, 1944. [454]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS

Upon request of the hereinafter consenting signatories:

The Court being of opinion that all of the exhibits received or marked at the trial of this action should be inspected by the appellate court and sent to the appellate court in lieu of copies pursuant to Rule 75(i) of the Rules of Civil Procedure, it is

Ordered that the Clerk of this District Court forward said exhibits to the Clerk of the United States Circuit Court of Appeals, Ninth Circuit, to

be held by the latter clerk for the use of the appellate court until the decision of the appellate [458] court on the appeal from the judgment taken by the defendants.

A. F. ST. SURE

United States District Judge

By consent:

ALFRED F. BRESLAUER

THELMA S. HERZIG

M. MITCHELL BOURQUIN

GEORGE OLSHAUSEN

Attorneys for Plaintiff

GEO. M. NAUS

LOUIS H. BROWNSTONE

Attorneys for Defendants

[Endorsed]: Filed May 9, 1944. [459]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM PORTION
OF JUDGMENT

To: The Clerk of the Above Entitled Court and to
Messrs. Louis J. Brownstone and George M.
Naus, their attorneys:

You and each of you will please take notice that
plaintiff hereby appeals to the United States Cir-
cuit Court of Appeal of the 9th Circuit from that
portion of the judgment entered in the above enti-

tled action limiting plaintiff's recovery to the sum of \$72,687.50.

Dated: May 29, 1944.

ALFRED F. BRESLAUER
THELMA S. HERZIG
M. MITCHELL BOURQUIN
GEORGE OLSHAUSEN
Attorneys for Plaintiff.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Jun. 3, 1944. [461]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 468 pages, numbered from 1 to 468, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Park, Benziger & Co., Inc., a corporation, Plaintiff, vs. Pierre Bercut and Jean Bercut, individually and as co-partners doing business as P & J Cellars, a co-partnership, First Doe and Second Doe, Defendants, No. 22625S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of \$157.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of July, A. D. 1944.

C. W. CALBREATH

Clerk

(Seal)

By E. VAN BUREN

Deputy Clerk [468]

[Endorsed]: No. 10823. United States Circuit Court of Appeals for the Ninth Circuit. Pierre Bercut and Jean Bercut, Individually, and as Copartners doing business as P & J Cellars, a Copartnership, Appellants, vs. Park, Benziger & Co., Inc., a Corporation, Appellee, and Park Benziger & Co., Inc., a Corporation, Appellant, vs. Pierre Bercut and Jean Bercut, Individually, and as Copartners doing business as P & J Cellars, a Copartnership, Appellees. Transcript of Record upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 13, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10823

PIERRE BER CUT and JEAN BER CUT, indi-
vidually and doing business as P & J Cellars,
a copartnership,

Appellants,

vs.

PARK, BENZIGER & CO., INC., a corporation,
Appellee.

STATEMENT OF POINTS AND
DESIGNATION OF PRINTING

The following is a statement of the points on which the appellants intend to rely upon this appeal:

1. The court below erred in denying the motion of appellants for direction of a verdict in their favor, and they rely separately and severally upon each and all of the grounds of the motion.

2. The court below erred in denying the motions made by appellants under Rules 50(b) and 59 FRCP.

3. The court below erred in refusing to instruct the jury in accordance with Defense Requests numbered 15, 16, 32, 33, 34 and 37, on the grounds stated in the exceptions taken in due time at the trial to the refusal of the court below to grant those Requests.

4. The court below erred in modifying Defense Request No. 35 for an instruction, by striking out the last sentence of the Request, as excepted to at the time of the settlement of the instructions.

5. The court below erred in failing to give any instruction upon the burden of proof.

6. The court below erred in not instructing the jury that the maximum OPA markup was and ~~is~~ 25%, in response to the inquiry received by the Court from the jury during their deliberations.

Designation of Printing

Appellants therefore designate the following parts of the record which they think necessary for the consideration of the foregoing Points:

a. Pleadings.

b. Verdict.

c. The judgment entered by the clerk upon the verdict.

d. The whole of the stenographic reporter's transcript of the evidence and proceedings at the trial (which includes, in addition to the evidence offered and received, copies of some exhibits, the proceedings on settlement of instructions, and proceedings connected with receipt by the Court from the jury, during their deliberations, of a special inquiry from the jury).

e. The instructions requested by these appellants, being Defense Requests Nos. 1 to 40, both inclusive.

f. The motions made by these appellants under Rules 50(b) and 59 FRCP.

- g. Our notice of appeal.
- h. Order for transmission of original exhibits.
- i. The following exhibits: Plaintiff's exhibits, 7 Permit; 9 Demand; 14 Retail price list; 15 Wholesale price list; and Defendants' Exhibit D, License.
- k. This statement of points and designation.

GEORGE M. NAUS

LOUIS H. BROWNSTONE

Attorneys for appellants,

Pierre Bercut and Jean Bercut.

Address: 706 Alexander Building,
San Francisco.

Receipt of a copy of the foregoing Statement of Points and Designation of Printing, this 21 day of July, 1944, is hereby acknowledged.

ALFRED F. BRESLAUER

THELMA S. HERZIG

M. MITCHELL BOURQUIN

GEORGE OLSHAUSEN

Attorneys for Appellee.

[Endorsed]: Filed Jul. 21, 1944.

[Title of Circuit Court of Appeals and Cause.]

CROSS-APPELLANT'S STATEMENT OF
POINTS ON CROSS-APPEAL

Cross-Appellant will rely on the following points in support of the cross appeal:

1. Under a proper construction of the contract

between the parties the court should have submitted the issue of damages to the jury on the basis of 60,000 cases instead of only 26,691 cases.

2. Alternatively and in any event the court should have submitted the issue of damages to the jury upon the basis of the number of cases (approximately 36,000) which were contracted to be shipped during the remainder of the year 1943 and during the year 1944 instead of on the basis of only 26,691.

3. Upon the issue of damages the court should have admitted evidence on the prices at which the defendant sold the wines in question after repudiation of their contract with plaintiff, said evidence being admissible either to prove market price and to show the difference between the contract price and market price or to prove value (if there were thought to be no market) and to prove the difference between the value and the contract price.

Note: The cross-appeal is filed solely to protect appellee in the event of another trial. In the event of affirmance upon appellants' appeal the cross-appellant desires cross-appeal to be dismissed.

ALFRED F. BRESLAUER
THELMA S. HERZIG
M. MITCHELL BOURQUIN
GEORGE OLSHAUSEN

Attorneys for Appellee, and
Cross-Appellant.

Receipt of copy of the foregoing Statement of Points on Cross-Appeal is hereby admitted this 19th day of July, 1944.

GEORGE M. NAUS

LOUIS H. BROWNSTONE

Attorneys for Appellants and
Cross-Appellees.

[Endorsed]: Filed Jul. 19, 1944.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PRINTING

Appellee and Cross-appellant hereby designate the following parts of the record to be printed in addition to those parts already requested by appellants:

1. Plaintiff's requests for instructions to the jury.

2. Plaintiff's Exhibit 13-A (schedule of wine sales by the defendants).

3. Plaintiff's Exhibit 13-B (deposition).

ALFRED F. BRESLAUER

THELMA S. HERZIG

M. MITCHELL BOURQUIN

GEORGE OLSHAUSEN

Attorneys for Appellee.

Receipt of copy of the within Designation of Printing admitted this 25th day of July, 1944.

LOUIS H. BROWNSTONE

and

GEORGE M. NAUS

Attorneys for Appellants

[Endorsed]: Filed Jul. 25, 1944.

No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individually,
and as Copartners doing business as P & J
CELLARS (a Copartnership),

Appellants,

vs.

PARK, BENZIGER & Co., INC. (a Corporation),

Appellee,

and

PARK, BENZIGER & Co., INC. (a Corporation),

Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually,
and as Copartners doing business as P & J
CELLARS (a Copartnership),

Cross-Appellees.

OPENING BRIEF FOR APPELLANTS.

GEORGE M. NAUS,

Alexander Building, San Francisco,

LOUIS H. BROWNSTONE,

Russ Building, San Francisco,

Attorneys for Appellants.

Pierre Bercut and Jean Bercut

FILED

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individually,
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Appellee,

and

PARK, BENZIGER & Co., INC. (a Corporation),

Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually,
and as Copartners doing business as P & J
CELLARS (a Copartnership),

Cross-Appellees.

OPENING BRIEF FOR APPELLANTS.

May it please the Court:

This is an appeal, R. 542, from a judgment, R. 67, based upon a verdict, R. 66, assessing damages in the sum of \$72,687.50 in favor of appellee, Park, Benziger & Co., Inc., a corporation, and against appellants, Pierre Bercut and Jean Bercut, in a civil action for repudiation or anticipatory breach of a contract for sale of wine.

JURISDICTIONAL STATEMENT.

The statutory provision that sustains the jurisdiction of the District Court is Judicial Code § 24 first, 28 USC § 41(1), granting the familiar original jurisdiction to the District Courts of all suits of a civil nature at common law where the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000, and is between citizens of different states. The complaint, R. 2, and amended complaint, R. 10, disclose the requisite diversity by showing that appellee is a New York corporation, its assignor a citizen of New York, and the appellants are citizens of California, and it alleged damages in the aggregate principal amount of \$242,050 for breach of contract.

The statutory jurisdiction that sustains the appellate jurisdiction of this Circuit Court of Appeals is Judicial Code § 128, 28 USC § 225, granting the familiar jurisdiction to "review final decisions in the District Court".

STATEMENT OF THE CASE.

The amended complaint, R. 10, declares upon a written contract dated January 29, 1943, and a written modification thereof dated February 3, 1943. We print the contract as Appendix A, and the modification as Appendix B. The preamble of the agreement identifies the parties thereto as follows, R. 15:

"This Agreement entered into this 29th day of January, 1943 by and between Pierre Bercut and Jean Bercut, doing business as a co-partnership, under the firm name and style of P & J Cellars, License No. 14-P-175 at 743 Market Street in the City and County of San Francisco, State of California, hereinafter referred to as party of the first part and

Chateau Montelena of New York, License No. WW9 with offices at 48 West 48th Street in the City and State of New York herein represented by Serge Hermann, its duly authorized special representative residing at No. 321 West 55th Street, Borough of Manhattan, City and State of New York party of the second part.”

“Chateau Montelena of New York” is simply a fictitious business name used by Louise Hermann, the wife of Serge Hermann, who signed the contract on behalf of “Chateau Montelena of New York”. In the charge to the jury, the trial Court said, R. 514:

“The evidence shows that ‘Chateau Montelena of New York’ was simply a business or trade name adopted or used by the wife of Serge Hermann in connection with the wine contract with the Bercuts, and that Serge Hermann had complete and entire charge of the business dealings under the name of Chateau Montelena of New York. I therefore instruct you that for the purposes of the present lawsuit you are to consider Serge Hermann and Chateau Montelena of New York as one and the same, and the act or conduct of either as the act or conduct of the other, and any mention of either in these instructions shall be deemed to include the other or both.”

Serge Hermann is a wine broker operating out of an address in New York, R. 170. The business of the contract with the appellants Bercut was handled entirely by Serge Hermann, whose wife left it to him to handle as he pleased, R. 183. Prior to the contract with appellants Bercut, neither Serge Hermann, nor his wife, had ever bought or sold wine on their own account, R. 187, with the single exception of a previous transaction, relating to one carload, with a man named Feldheym, R. 187.

Appellee, Park, Benziger & Co., Inc., a corporation (which became the assignee of the contract sued upon as will hereinafter appear) was engaged in business in New York as an exporter and importer and "had a whiskey and wine department", R. 71. Their Vice President, Mr. Philip Elman, testified, R. 71:

"We were importing quite a lot of wines from various countries. Most of our business had been import, and due to conditions over in Europe that came about in 1940 with France, we continued to receive less and less import wines, and we were more or less becoming interested in doing a domestic wine business to fill that gap of imported wines, and so we commenced to do business with certain domestic manufacturers of wines looking to find and acquire certain agencies for good producers to sell in place of our import wines.

Q. What was the situation in the United States and interstate in the wine industry or the wine market at the commencement of the year 1943?

A. At that time the OPA and the freeze of grapes the previous year by the United States Government for use for raisins for the armed forces of this country created a tremendous shortage in available grapes for wine in California, which resulted in a very short crop and manufacture of grapes in the year preceding that, in 1942, so that in 1943 the condition of the wine market had become so acute there were no wines available for sale to us. We purchased small lots of wine that we were able to get, but, of course, we were interested more or less in acquiring larger amounts of wine to substantiate the amount of business that we had, because we couldn't import wines. We could find no wines on the market."

Elman and Hermann had a conversation on or shortly before January 5, 1943; Elman testified, R. 131-132:

“We were discussing the wine situation and that things were getting very scarce, and he said, ‘Well, I think with all my connections and my knowledge of the wine business, if I went to California I might be able to contact my friends out there or find some wines’.

I said, ‘Well, that seems to be quite a good idea’.
 * * * We said we were very much interested in buying wines, and if he found anything that had any value to it, we would be very much interested in it, because we wanted to find something with a good agency that we could continue on, on a domestic wine basis.”

Hermann came to San Francisco and in a roundabout way learned that appellants Bereut were holding a stock of wine (which turned out to be the 26,691 cases later covered by the contract) which they had obtained from the California Wine Association (R. 83) and racked, i.e., laid down in storage a year or two before. On cross-examination Hermann testified (R. 188-189):

“Q. You say you were looking for some California wines that you could buy while you were here in January, 1943. How long did you look for some wine that could be bought? How long did it take you to find it?

A. I was extremely fortunate. I happened to know practically every jobber and every winery in the country, and when I came over to San Francisco I found that the Palace Hotel was filled with every person interested in the wine industry. I came up to see my friend Mr. Baer with the idea he might let me know where I could get some wine, and just by sheer accident Mr. Baer happened to know the Bereuts and happened to know that the Bereuts had put some wine away a couple of years before, and mentioned to me that due to the fact they were French

that I might go down and see them and find out if something could come of it.

I went down to see the market [a meat market operated by the Bercuts in San Francisco] without any hope to find wine, but as a man interested in his business and following it up, I followed—I was going to try to do what I could. * * *

Q. How long did it take you to find the Bercut wine?

A. Two weeks.

Q. During that two weeks' period were you looking generally for wine?

A. I certainly was.

Q. During that two weeks' period did you find any other wines than the Bercut wine that might be available?

A. Absolutely impossible. I looked everywhere, talked to any number of people, and sent out many personal letters, and received replies, every one the same: 'We can't give you any line; we are tied up; we have no wine.' "

Hermann and Elman were both strangers to appellants Bercut and there had never been any previous business dealings between them. On January 29, 1943, the contract sued upon was entered into. It called for shipment of wine at the rate of a carload a month to begin "during the month of February, 1943". On February 3, 1943, the modification was made, and it stated, *inter alia*:

"That shipments of first car are to be made at such time as approval of labels can be secured and both parties are in a position to effect shipments, but the greatest diligence should be exercised by both parties in order to commence at least 60 days hence."

Hermann, as a witness for appellee, testified to the following discussion taking place when the contract was signed on January 29, 1943, R. 171-172:

“Q. Will you tell us whether or not in the course of your negotiations for that wine with the Bercut Brothers you told them where or with whom you expected to market the wine?

A. On the day of the signature, or the signing of the contract, I explained to them that it was my intention to appoint a distributor in New York and have them take over the sale of that wine, and that I had particularly in mind Park, Benziger & Company, subject of course to their accepting the proposition after I had explained it to them. * * * It came up when Mr. Evans asked me what name he was to make out the contract.

Q. What was the conversation with respect to that?

A. The conversation was as follows: ‘I am not altogether sure as to whether Park, Benziger will take over the contract or not, because it is subject to their finding it to their liking.’

Q. Did they ask you in what name to make out the contract?

A. That is what Mr. Evans asked me, ‘In what name do you want it, to Park, Benziger, or do you want it to Chateau Montelena?’ And I answered, ‘You might just as well make it Chateau Montelena, as I am going to submit it to Park, Benziger & Company, but send the samples to Park, Benziger & Company.’

Q. Now, Mr. Hermann, you did at that time arrange for the shipping of samples to Park, Benziger; you did with them?

A. Yes.”

On February 2, 1943, the day before the modification was signed, Hermann, at San Francisco, sent the following telegram to Elman, at New York, R. 74:

“Have definitely completed the finest bottle deal dreamed of. Suggest you phone me on receipt this wire. Kindly advise Irene am well. Regards.”

When Hermann entered into the contract with appellants Bercut, Hermann knew that if the contract should be thereafter breached by the Bercuts, neither Hermann nor Park, Benziger & Co. could obtain other wine in the market to take the place of the Bercut wine, but notwithstanding that knowledge by him he never informed nor gave any notice to the Bercuts that if at any future time they broke the contract he would be unable to replace the wine. He testified, R. 220-221:

“Mr. Naus. Q. Up to and including January 29, 1943, in your negotiating conferences with the Bercuts did you at any time state to them or tell them that if at any time in the future they should break the contract you would be unable to get any other wine to replace it?

A. Conversation of that nature never took place between us. The contract was satisfactory; we were happy with it and took it up.

Q. Let us stay with the question: Up to and including the time that the contract was signed you never gave them any notice to that effect, did you? You never gave them any information to that effect?

A. Pardon me, Mr. Naus. Do you mean signed after I brought it to them, or signed between Bercut and myself? May I have the question a little clearer?

Q. I will reframe it. I will go a little further. The final paper that went to the final form of the contract was a paper signed on February 3, 1943, wasn't it?—that letter modifying it?

A. Between the Bercuts and Chateau Montelena?

Q. Yes.

A. Yes.

Q. Up to and including the time that letter of February 3, 1943, was signed and delivered to you, had you ever informed the Bercuts if at any future time they broke the contract you would be unable to replace the wine?

A. We didn't even speak about it, no.

Q. The answer is you did not?

A. I did not."

Hermann also knew that this was the first occasion in which the Bercuts ever sold any wine to anybody. He testified, R. 215:

"Q. Then, as I understand it, up to the date of the signing of the contract on January 29, 1943, there had been no wine put out under a label or a mark 'Bercut Freres'?

A. As far as I know, not. They told me they were not in the wine business.

Q. So far as you know, they never were?

A. No, I never saw the 'Bercut Freres' label.

Q. You told us yesterday, if I understood it, that you kept yourself informed and in contact with wine merchants, brokers and the like who were in that field, and when you first heard about this arrangement, that you went down to the butcher shop to find them, and that is the first time that you heard of them in the wine business?

A. That is correct.

Q. Up to that time no one had heard of them in the wine business?

A. No, sir.

Q. Up to that date they had never sold any wine, had they?

A. That is correct, so far as I know."

At the time of entering into the contract the Bercuts were ignorant of the fact that if they thereafter breached the contract other wine would not be obtainable in the market by Hermann or Park, Benziger & Co., R. 343 and R. 420. The Bercuts had never previously been in any wine deal. They had varied business interests but up to the time of this deal with Hermann they had never sold so much as one bottle of wine to anyone in the world, R. 400. It had simply happened that in February, 1941, or two years before the deal with Hermann, the Bercuts had obtained majority control and management of a cold storage business in San Francisco, known as Merchants Ice and Cold Storage Company, R. 399, 418-419, and found there considerable idle or vacant cold storage space, R. 419. "It was a place well suited for wine but there was no wine in it", R. 419. Peter Bercut testified, R. 419-421:

"Q. Did you and your brother Jean first acquire this stock of wine before or after you took over that management of Merchants?

A. After.

Q. At the time you took over the management of Merchants Ice you first fired out the old management, did you?

A. Yes.

Q. After taking it over did you or not have considerable idle or vacant space down at Merchants Ice?

A. Very much so. It was a place well suited for wine, but there was no wine in it.

Q. Prior to that time had you ever dealt in wine?

A. No, sir.

Q. Had you ever bought or sold wine before?

A. No, sir, outside of what I could use in my own family. * * *

Q. About how soon was it after you took over Merchants Ice that you and Jean started to acquire this stock of three hundred odd thousand bottles?

A. Within the first six months, I believe.

Q. I believe you acquired the wine in bulk or gallonage from Fruit Industries in the first place?

A. Not exactly. It was acquired that way, but it was that the Fruit Industries agreed to bottle it for us.

Q. You bought it in bulk and arranged with them and you supplied the bottles and arranged with them to bottle it and deliver it to you in bottles?

A. Yes.

Q. Then you laid it down in the Merchants Ice?

A. Yes, that is the only way I knew it.

Q. After laying it down, you and your brother Jean kept it under a fairly constant or even temperature from the time you acquired it until——

A. The engineer for Merchants Ice attended to that.

Q. At the time you and Serge Hermann signed this original contract of January 29, 1943, at the time you entered into that contract did you then know that if at any time thereafter you did not deliver the wine as called for by the contract that the buyer could not acquire it elsewhere?

A. I didn't have the least idea of that.

Q. Did anybody up to and including January 29th give you notice or warning or information that if you did not deliver that wine it could not be gotten somewhere else?

A. No. Our deal was entirely between ourselves, and it did not go outside; I didn't go out and talk about it, or anything. I just kept that part of our own business."

Park, Benziger & Co. received the samples and found them satisfactory, R. 84. Hermann returned to New York,

arriving there on Saturday, February 13, 1943, R. 86. The contract called, *inter alia*, for labels to be prepared and supplied by the buyer; and on Monday, February 15, 1943, Hermann, at New York, wrote air mail on the letterhead of Park, Benziger & Co. a letter to Peter Bercut, c/o Bercut Brothers, R. 86-88, a copy of which we append as Appendix C. Contemporaneously with the writing of that letter Hermann and Elman entered into an oral deal under which Park, Benziger & Co. "purchased the contract" from Hermann, R. 75, which oral deal of February 15, 1943, was reduced to two writings dated February 25, 1943. One paper was given by Hermann to Park, Benziger & Co., as follows, R. 83:

"Park, Benziger & Co., Inc.,
24 State St.,
New York, N. Y.

Dear Sirs:

As per our agreement, we hereby assign to you the agreement and all rights thereunder, made on January 29, 1943, with Pierre Bercut and Jean Bercut, doing business under the name of P. & J. Cellars, of San Francisco, California.

Yours very truly,

Chateau Montelena of N. Y.
Per Serge Hermann"

The other paper, dated February 25, 1943, was given by Park, Benziger & Co. to Hermann, as follows, R. 90-91:

"Mr. Serge Hermann,
48 West 48th St.,
New York, N. Y.

Dear Mr. Hermann:

In consideration of your assigning to Park, Benziger & Co., Inc. the contract which Chateau Montelena of New York, represented by Serge Hermann,

made with Messrs. Pierre and Jean Bercut, trading as P. & J. Cellars, of San Francisco, California, covering an approximate lot of 60,000 cases of Assorted Wines, we hereby agree to pay you a commission equal to 50% of the net profits derived from the handling and sale of these goods at wholesale or retail, and you are to exert your efforts to the best of your ability in the promotion and sale of the above merchandise.

You are also to participate in any further business we may have with P. & J. Cellars on the same basis. If we sustain a loss on any business with P. & J. Cellars, such loss shall be charged against future profits in the computation of your commission on future business.

Yours very truly,
 Park, Benziger & Co., Inc.,
 J. R. Benziger,
 President."

Those two papers comprise the whole of the documentary basis of the arrangement between Hermann and Elman, R. 143-144. Thereunder, Hermann was to become an employe of Park, Benziger & Co. in promoting a sales market for the sale of the wine by Park, Benziger & Co., which in turn required the liquor licensing of Hermann as a salesman or employe of Park, Benziger & Co. under the law of New York. Elman testified, R. 97-98:

"Mr. Bourquin. Q. Following your purchase of that contract, you had arranged with Mr. Hermann, did you, you had entered arrangements for the services of Mr. Hermann in the sales of the wines?

A. Yes. We decided to employ Mr. Hermann as a salesman of Park, Benziger & Company, and we

submitted to the New York State Liquor Authorities an application for a solicitor's permit in New York State.

Q. That was a solicitor's permit issued at your request to him as a solicitor or salesman for Park, Benziger & Company?

A. Yes.

Q. Taking effect when?

A. Taking effect almost immediately, after we had decided to purchase the contract from him."

(A photograph of his salesman's license or "solicitor's permit" appears at R. 100.) Hermann was to give his full time to selling the wine for Park, Benziger & Co., R. 141-142. Elman testified, R. 140-142:

"Q. Then what in substance were the terms on which you told Hermann orally that you would take it over?

A. We discussed the matter thoroughly with him and we agreed to take over the contract and give him fifty per cent commission of the net profits on the sale of the merchandise.

Q. What did he agree to do?

A. Well, he agreed to sell us the contract for that.

Q. Was anything said about Hermann giving his time to selling the wine after you got it?

A. Yes, he asked us whether we would like to have him promote and sell the wines, and we said, 'Yes, it might be a very good idea,' since he knew, I thought, a lot more about the actual wines than we did at that time. I hadn't seen them. He seemed to know the people quite well, thought very highly of them, and he asked us whether we would like to do that, discuss that point, and we said, 'Yes,' and we decided he was to become an employee of

Park, Benziger & Company as our salesman to sponsor the wine and sell it and promote it, help in it in every way he could.

Q. You said he was to become your employee. Was he to become a full-time employee and sell this Bercut wine?

A. A salesman for us to sell the Bercut wine.

* * *

Q. Was the arrangement or not that he was to give his full time to selling the wine after you got it from the Bercuts?

A. Yes, he would give his full time to it."

Hermann was to do that selling at his own expense; Elman testified, R. 147-148:

"Q. Incidentally, in that fifty per cent arrangement you had with him, first orally and later in writing, Hermann going around selling was to be at his own expense, wasn't it?

A. That is right.

Q. Any and every expense, of whatever nature, he may have incurred from the beginning, January, 1943, down to the present time has been an expense of his own?

A. That is right."

He further testified, R. 149:

"A. We gave Mr. Hermann a fifty per cent net commission on the sale of the Bercut wines. That was the arrangement. Now, in so far as expenses are concerned, after we took the contract and he came to work for us as a salesman to promote the wines in that deal, then the monies that he spent in the promotion for it was for his own account.

Q. Yes.

A. That is right, after that."

He further testified, R. 150-151:

“Q. As I understood some of your answers, you are suggesting, at least, that Hermann was simply an employee or was to be an employee or commission salesman for Park, Benziger & Co.?”

A. That is right, in the sale of these wines.”

Hermann testified, R. 190-191, in substance to the same effect.

A domestic wine deal, and particularly one of this nature, was something new to Park, Benziger & Co. and was in the nature of new promotion by them. Elman testified, R. 162-163:

“A. Well, we are never in touch with the domestic market to that point of where we could place a finger on a broker and say we could buy a particular wine from him, because we have never been in the domestic wine business.

Q. As a matter of fact, this was a brand new venture of yours, wasn't it, the Park, Benziger & Company?

A. Well, not a brand new venture entirely, but it was a new phase of business, yes, that's right. We had never purchased and sold California wines to any great extent before.

Q. You are brand new in the business as to wineries and wines generally?

A. That's right.

Q. Well, it was brand new to the company, in fact, this California still wine business?

A. Yes.

Q. As to handling it in quantities and as a continuous line?

A. Yes.

Q. You never had any experience with that before, had you?

A. No.”

After some correspondence between the parties filled with promotional enthusiasm and speaking of having an artist design labels, and the like, Elman came to San Francisco, arriving April 16, 1943, R. 101, having been preceded by Hermann about a week. Elman looked at the wine or had conferences with appellants Bercut practically daily thereafter until the breaking of relations, on April 26, 1943. Elman testified, R. 101-102:

“Q. Did you see Mr. Jean Bercut or Mr. Peter Bercut, or both of them, from time to time, after your first visit?

A. Consistently; every day from the date I arrived. I believe I came here on a Friday. I saw him Friday and Saturday, and then we did not see him on Sunday, and Monday, which was a business day, we started in with our meetings again with either Mr. Jean Bercut or Mr. Peter Bercut, consistently, right through that entire week, working and arranging for the bottling of those wines. I went down to see the wines, I had never seen them before, saw how they were racked to get a picture of it so I could build it into a campaign of promotional sales. We had started taking films of the huge warehouse with Mr. Jean Bercut or Mr. Peter Bercut alongside the wines, looking at a bottle of wine. Those films were to be used for promotional work to show the huge 325,000 cases bottled, at least 325,000 bottles that were built into that magnificent warehouse there, that were aged and stored and racked. This was going to be the story on the business of aging wines in this country, it was something entirely new and novel. I mean it had never been done in the United States.”

Meanwhile, appellant Jean Bercut had heard some disturbing information about the business history of Her-

mann, and Elman testified that the following occurred at a conference on April 26, 1943, at the office of the Bercuts, R. 111-115:

“Q. On that occasion will you tell us whether or not either of the Bercuts voiced any dissatisfaction with Mr. Hermann?

A. They certainly did.

Q. Will you tell us by whom and what it was; just go ahead and tell us.

A. Well, as I recall, Mr. Jean Bercut asked me to step in the office and asked Mr. Hermann to wait outside. He said, ‘Mr. Elman, I would like to talk to you for a few minutes; Serge, would you sit down a few minutes until I get through?’. He said, ‘Fine’. We went in and when I was in there with him he said, ‘Mr. Elman, I have some very bad news for you’. He said, ‘We have inquired about Mr. Serge Hermann and find he had some business dispute here in town and we would not like to do any business with him, we would like to have our contract with you’; I said, ‘Well, that’s fine; we are doing business together’, I said, ‘but what is this business dispute about?’. He explained the entire business dispute related to this Chateau Montelena dealing of some kind or other. So I told him them, I said, as I recall it, ‘I am sorry’—Oh, yes. He said, ‘We don’t want to have anything to do with Mr. Serge Hermann because of the business deals we have heard about him’. I said, ‘Well, the contract was assigned to Park-Benziger. You have been doing business with Park, Benziger right along and will continue to do business with Park, Benziger’. He said, ‘We don’t want to have anything to do with Hermann at all’. I said, ‘Well, of course, that is impossible, because we have an arrangement with Mr. Hermann, but we will take care of him’. I said, ‘We will take all the

wine that we are purchasing from you'. He said, 'No, we don't want him to have anything at all to do with the deal'. I said, 'Well, we don't have anything to do —'. Then Mr. Evans, who was sitting in on this * * * said something—Mr. Peter Bercut handed him a contract and Mr. Peter Bercut said to me, handing me this contract, he said, 'Well, do you see anything in this contract that says Mr. Hermann has the right to assign?'. I looked at the contract and I said, 'Apparently there is nothing in there that says he has the right to assign'. I then made the point he had the right to assign because the contract went to our lawyers in New York and we told them to look over that contract and they forwarded it back to us as being all right legally, so far as they were concerned, the deal was excellent for us. So we naturally made arrangements to have the assignment completed and so on. Then I said, 'In all fairness', I said, 'you ought to have Mr. Hermann come in and tell his side of the story'. So Jean went out and called Mr. Hermann in and Mr. Hermann came in and they told him about what they had heard about Chateau Montelena. Mr. Hermann said he would be very glad to get in touch with some others in San Francisco who had told them about this business dispute, and who could explain any doubt that they had pertaining to it, and so forth. Then Mr. Peter Bercut gave Mr. Hermann the contract and said to him, 'Will you show me where this says in here that you have the right to assign that contract?'. Mr. Hermann's answer was, 'Will you show me where this says I haven't the right to assign the contract? You were doing business with Park-Benziger right along. What is it all about? If it has something that you do not like, why didn't you tell them about it?'. He said, 'You are doing business with them'. He said, 'Well, we want you to give us a personal release

from the contract, we don't want to have anything to do with you, we want to do our business with Park, Benziger & Company; we don't want to have anything to do with you'. Mr. Hermann said, 'Well, if that's the way you want it, I have my agreement with Park-Benziger, it's all right with me'. They said, 'Yes, we want to have a personal release from you, because we want to do business with Park-Benziger; now, give us a personal release'. He said, 'Sure, if that's the way you feel about it it's all right with me, so long as the agreement can continue on with Park-Benziger and yourself'. So we left then.

Q. Did that rupture put an end to this cordial relationship that you had between you?

A. No, no, everything was smoothed out. Then, I might back up there a moment, Serge said it was all right with him, he was going to give them the release they wanted for the purpose of facilitating the deal."

With respect to the meeting on April 26, 1943, Hermann testified, R. 174-176, cumulatively.

Pursuant to the arrangement the parties again met on April 27, 1943, and with respect to the meeting on that day, Elman testified, R. 118-119:

"A. Well, that morning I came in I handed Mr. Evans an order which I had received from the mail, or in the mail, pertaining to the final shipment of another quantity of wine, and I laid it on the, on his desk, and told him to expedite the shipment on that. On the table as we came in were quite a number of copies of papers, it was a release. Mr. Peter Bercut was sitting down there. Mr. Jean brought us in and Mr. Evans handed Mr. Hermann these papers and said, 'This is the release we made up for you.' * * * He said, 'This is the release that we were talking

about yesterday.' Mr. Hermann examined it and there were some discussions there, and Mr. Hermann handed it to me and said, 'Is it all right Phil?' I looked at it and I said it was an agreement between Chateau Montelena and Serge—or P. & J. Sellars and Serge Hermann. I said, 'I have nothing to do with it. Evidently that is the release that Mr. Bercut was talking about. We have a contract. I can't see any objection to it.' I handed it to him and Serge signed it."

With respect to the meeting on April 27, 1943, Hermann testified R. 176-177, in substance to the same effect. The writing signed by Hermann and the Bercuts on April 27, 1943 was received in evidence as Plaintiff's Exhibit 11, R. 178, and reads as follows:

"AGREEMENT.

THIS AGREEMENT entered into this 26th day of April, 1943 by and between Pierre Bercut and Jean Bercut doing business under the firm name and Style of P. & J. Cellars in the City and County of San Francisco, State of California hereinafter referred to as party of the first part and Serge Hermann represented to be the duly authorized special representative of the CHATEAU MONTELENA OF NEW YORK competent to act in its behalf party of the second part, WITNESSETH:

WHEREAS the parties herein referred to did on the 29th day of January 1943 execute a certain agreement containing certain terms and conditions and WHEREAS it is considered by mutual consent that it will be to the best interests of both parties that the said agreement be canceled in its entirety.

NOW THEREFORE for and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid receipt of which is hereby acknowledged it is mutually agreed that all of the provisions, covenants, terms

and conditions that were specified, embodied or stipulated in said agreement are hereby declared null and void and without any force or effect, in the same manner and to all intent and purposes the same as if said agreement had never been entered into or had ever been written, and each of said parties shall be deemed to be free and clear of any and all claims, demands or obligations asserted by the one party against the other from the beginning of the world to the date hereof.

IN WITNESS WHEREOF said parties have hereunto set their hands this 27th day of April 1943.”

The foregoing gives the plaintiff's version of the occurrences on April 26 and 27 of 1943, because it is the version most favorable to the plaintiff and was accepted by the jury. Under the version of the defendants, the occurrences on April 26 and 27 put an end to the whole arrangement, not only with Herman, but with Park, Benziger & Co. as well.

The signing of the paper on April 27, 1943 was followed by an offer by Jean Bercut to Elman to sell three carloads of the wine to Park, Benziger & Co. at the contract prices, but for cash, whereupon Elman became angry as to the cash carloads (1500 cases a carload, amounting to 4500 cases). Elman testified, R. 121-122:

“Mr. Bourquin. Q. Will you tell us in substance what Mr. Jean Bercut said, how he put it, when he came back to the room.

A. When he told me that I said, ‘What do you mean?’ He said, ‘You don’t want any contract. I will give you three carloads of wine at the contract price, and that is all.’ I said, ‘What do you mean, three carloads of wine? We have a contract with you.’ He said, ‘Well, I will give you three carloads of wine at the contract price, and maybe later on—we will see,

we will see.' He said, 'For cash.' I said, 'What do you mean? We have a contract with you for 60,000 cases of wine. Now, you have a stipulated price in there and you have the quantity of merchandise in there, and that is what the company wants to be performed.' He said, 'No more contract. We don't want no more contract. I will give you three carloads of wine, and maybe later on the wine will be worth eight or nine or ten dollars to you.' I said, 'What do you mean, eight or nine or ten dollars? The price in the contract is stipulated at \$5.25.' He said, 'Yes, I know, I know, but just three carloads of wine.' I said, 'We have a contract with you for 60,000 cases of wine at stipulated prices under certain terms. My company wants that contract performed, and that is what I am out here for.'

Then I got all excited and everything and walked out of the place, I guess."

Elman treated the foregoing as a repudiation of the contract by the Bereuts, i. e., an anticipatory breach, and the original complaint in this case was filed about three weeks afterward, i. e., on May 19, 1943, R. 7. (The transcript shows a filing on May 1944 which is an error.)

The wine was not obtainable elsewhere, R. 161. Elman testified, R. 163:

"Q. From April 27, 1943 did the Park, Benziger Company ever through you or through anybody make any attempt or effort to go out in the market and bring in any substitute wines?

A. No; we felt it was impossible.

Q. Well, you did not do it, because you knew you couldn't get it; isn't that correct?

A. I think so. * * *

Q. You couldn't get it because there was none in the market, isn't that correct?

A. That's right."

In the charge to the jury, the jury was charged, R. 520:

“I instruct you that the evidence before you is insufficient to show that the goods were obtainable elsewhere, that is, it is insufficient to show an available market. On the contrary it shows no available market. The rule in such case is that the measure of the buyer’s damages is the loss directly and naturally resulting in the ordinary course of events from the seller’s breach of contract, which rule as specifically applied to this case now before you means that, if you find there was a breach, either (1) the amount of the buyer’s outlay of expense in the course of preparing to carry out the contract before he knew that the seller would not perform, or (2) the net profits, if any, that the buyer was reasonably certain to have made if the seller had performed the contract.”

The plaintiff made no proof of the amount of any outlay and therefore the question went to the jury on the issue of “net profits” claimed to have been lost by the plaintiff.

On that issue the plaintiff made no proof whatever with respect to any past experience that it had had in the matter of profits arising from the sale of domestic or California wine. It had had a previous experience to the extent of 8000 or 9000 or 10,000 cases of California wine. Elman testified, R. 153:

“Q. What would you say was the aggregate number of cases of [bottled] wine that you had ever handled, California wine, the still wine, before the Bercut deal? * * *

A. * * * I would say around 5000 cases.

Q. That had been over what period?

A. I might be wrong on that, sir. I recall now we did have some merchandise which we had bought in cased goods from a California shipper down south,

who was a bottler. It might have run into a little more—probably eight or nine thousand, 10,000.

Q. My immediate question was, that total was spread over what period of time?

A. Oh, I would say it was over a year—a period of about a year—yes, 1942, I think. That is about the time we started to buy California wine, because our French stocks had been depleted, and we had our customers coming in constantly asking us if we could purchase wines for them, you see.

Q. Was any of this California still wine that you are speaking of ever put out before the Bercut deal under your own label?

A. No.

Mr. Naus. As I understand it, Mr. Elman, this wine involved in that Bercut deal that Hermann dug up for you was the initiation of a new line of business in your company, wasn't it?

A. A new line?

Q. That is to say, having to do with California still wines under your own label?

A. Yes."

In addition to that past experience with California wine the plaintiff had further past experience to the extent of 2500 cases of California wine of the Chianti type, R. 88, which had been, independently of the Hermann contract, ordered by the plaintiff from appellants in connection with Hermann's letter of February 15, 1943, plaintiff's Exhibit 3. The plaintiff made no proof whatever of its profit experience in handling those wines. The plaintiff relied entirely on two price lists that were received in evidence as its exhibits 13, R. 308-311, and 15, R. 316-318, over the following objection of appellants, R. 306:

"Mr. Naus. Objected to first as outside the issues; secondly, upon the ground that the evidence is insuffi-

cient to show and establish business in California wines of this type; third, on the ground there is no foundation to show any basis for any attempted effect of a calculation of supposed loss of supposed profits on that. There is no proof whatever—in fact, the proof is to the contrary—and no proof whatever that at the time of the contract, January 29, 1943, the defendants were put on notice or warning that if thereafter there was a breach, that loss of profits would be a consequence because of the unavailability of other wines in the market.”

Exhibit 14 is a list posted by the plaintiff with a public authority in New York under the Alcoholic Beverage Control Act of that state and is headed “Schedule of Wine Prices to Retailers, Effective for the month of March 1943”. In that list, at R. 311, the Bercut wines appear under the designation of “California ‘P & B’ Brand” and are priced to the retail trade at \$10.51 a case for the dry wines and \$10.96 for the sweet wines. Exhibit 15 is a list similarly posted with the same public authority and is headed “Schedule of Prices to Wholesalers, Effective for the month of May 1943” and, at R. 318, lists the price to the wholesaler at \$6.75 a case for the dry wines and \$7.50 a case for the sweet wines.

There is no evidence that any orders were taken or sales made under either list. The plaintiff’s proof of expected profits lost depended entirely on the assumption that the 26,691 cases of Bercut wine (which were to be shipped over a period of years at the rate of one carload or 1500 cases a month) would be sold at the prices stated in those lists, and that the excess of those prices over the contract price per case paid to the Bercuts would evidence the expected gross profits to the plaintiff, from

which the following deductions were to be made in arriving at net profits: since the contract with the Bereuts was f.o.b. San Francisco and retail sales under the New York list were quoted f.o.b. New York, there would be a deduction of 35 cents a case for freight and insurance, R. 313-314, in retail sales. In addition to that, Elman, who was not an accountant or auditor and who did not produce any accounts or books, assumed that the appellee would have an overhead expense of six per cent of the selling price. Elman testified, R. 303-304:

“Q. Let me ask you, What did the costs and charges of your company run in April 1943 for the handling and sale of wines of the types specified in the contract?

A. Mr. Naus. One moment. Objected to upon all the grounds heretofore stated, and upon the further ground that from the evidence it appears that they had no previous experience in handling such wines.

The Court. They had previous experience in handling wines, imported wines. It is true that conditions were such that they felt the need of dealing in domestic wines, and they turned to California for the purpose of getting domestic wines.

The Witness. That is right, your Honor. * * *

Q. Having in mind the experience you have had with marketing and promotion of wines and applying that to these questions now; is that not true?

A. Yes. * * *

The Court. You would have to make that more specific: 20,000 cases or 60,000 cases or whatever you have in mind. * * *

Q. Mr. Elman, what would the costs and charges for handling and promotion and sales of wines——

The Court. Such as that described in the contract Exhibit 2——

Mr. Bourquin. Q (continuing). —run you per case, per carload or per thousand cases in April 1943?

Mr. Naus. That is all subject to the same objection. The Court. Overruled.

A. About six per cent of the price, the selling price, your Honor.

Mr. Bourquin. Q. Six per cent of the selling price?

The Court. Q. Whether it was 1000 cases, 5000 cases or 30,000 cases?

A. It was based on the total volume of business we do per year, your Honor."

The foregoing is all the evidence laid by appellee before the jury as a basis of supposing or finding a loss of expected profits, and the amount of the verdict makes it plain that the jury assumed that about half of the 26,691 cases would be sold at the retail price and the other half at the wholesale price.

The foregoing retail and wholesale lists show that it was the plan of appellee to put the Bercut wine on the market under a new label. Park, Benziger & Co. had never theretofore put on the market any domestic or California wine under their own label. Under the contract with the Bercuts the label was to be designed and supplied by appellee. Appellee made no proof of the cost of labels. Moreover, Elman testified to the dusty appearance of the bottles as they laid in the warehouse of appellants and to the need of washing and polishing the bottles and wrapping them in tissue paper in order to make them attractive for sale by appellee. This would be an expense of appellee and Elman admitted in his testimony that he did not know what the cost of it would be. He testified, R. 161:

“Q. Do you know what the handling and washing would amount to per case, for washing bottles and wrapping them in tissue paper and buying the paper?

A. I wouldn't know, sir.”

With respect to the ability or inability of Park, Benziger & Co. to perform the contract, it developed at the trial that appellee is what is commonly known as a “dummy” corporation. It is and was a wholly owned subsidiary of another corporation, namely, Finlay, Holt & Company, R. 336. Appellee never at any time had a capital greater than the sum of \$1000, R. 336. Upon organization it issued capital stock for the sum of \$1000 in cash and this was its sole and only capital, R. 337-338. Any profits made by appellee were immediately paid out by it in the form of dividends to Finlay, Holt & Company, R. 338. Its current liabilities at all times equalled its current assets, R. 338. The purpose of the formation of this “dummy”, as stated by Mr. Elman, was to limit the liability of the officers of the mother holding company. Be that as it may, it appears, without dispute, from the evidence that the responsibility of appellee was limited to its \$1000 capitalization.

At the conclusion of all of the evidence, appellants moved for a directed verdict, R. 465, upon the following grounds, *inter alia*, R. 466-470:

“6. That the burden is on the plaintiff to show its own ability to perform, which ability has not been shown. In fact, the evidence shows that it would have had to finance the purchase of the wines under this contract with the Bercuts beyond the plaintiff's own means or assets.

7. That the plaintiff's claim is for the loss of profits, but the evidence fails to show that when the

contract was entered into on January 29, 1943, and as modified on February 3, 1943, that either or both of the defendants Bercut knew that the goods were not obtainable elsewhere or would not be obtainable elsewhere in the event of non-delivery by the defendants.

8. Upon the ground that the evidence in the case of loss of profit, such evidence as there is or to the extent that it could be said to be evidence, does not prove or show with reasonable certainty that the plaintiff suffered loss of anticipated profits, because the evidence shows that the plaintiff was launching a new enterprise with respect to the wine in suit, and the profits, if any, therefrom are left to guesswork, surmise, conjecture.

9. Upon the ground that lost profits have not been proved with reasonable certainty because the evidence shows that plaintiff had, during the year 1942, handled in various lots an aggregate of eight or nine thousand cases of California wines, but has made no showing of its loss of profits expected upon that wine, but on the contrary, instead of turning to better evidence has used worse or poor evidence by way of opinion or guesswork. * * *.

10. That lost profits have not been proved with reasonable certainty, because the evidence shows that concurrently and contemporaneously with the transaction covered by the contract of January 29, modified February 3, 1943, the parties in this litigation dealt in California wines of the Chianti type, or in Chianti type bottles, the wines being purchased by the plaintiff from the defendants to the extent of 3250 cases under the written order of February 15, 1943, followed to the extent of at least one carload, the evidence in other respects showing a carload is somewhere in the neighborhood of 1500 cases, ordered on April 27, 1943, and to the extent of an unspecified amount, apparently approximately a carload, at least a carload ordered

by the plaintiff from the defendant during the pendency of this suit, and the rule of law with respect to proof of lost profits being that past profits upon which the prediction must be made, that to the extent of past profits the loss may be shown from experience and from accounting records and accounting data and the like, which must be shown, and not be left to mere guess or surmise or conjecture or upon hope or expectation not founded upon past experience.

11. Lost profits have not been proved with reasonable certainty, because the evidence shows that the plaintiff intended to wash the bottles, the bottles containing the wine, and wrap each of them in tissue paper before reselling them. .

The Court. It seems to me that was left undecided; in other words, left in the air.

Mr. Naus. No. It is hardly left in the air. It is worse than being merely in the air. I would like to add one further sentence to that.

The Court. Go ahead.

Mr. Naus. No proof of the labor cost thereof, nor has it been shown what capital would be used by the plaintiff in the conduct of their transactions in this line, and the amount of interest upon that capital.

12. That the plaintiff not only has failed to make such a showing of loss of anticipated profits as is required by the law, but, in the alternative, the plaintiff has also failed to prove the amount of any outlay by it in preparation for performance in lieu of the proof with reasonable certainty of lost profits."

Subsequently to the verdict, appellants made a motion to set aside the verdict under Rule 50b FRCP, R. 463.

SPECIFICATIONS OF ERROR.¹

I. The court below erred in denying appellants' motion for 'a directed verdict, and in the denial of the companion motion for judgment notwithstanding the verdict.

II. The court below erred in refusing our Instruction Request No. 32, R. 58, to-wit:

“If you find from the evidence that plaintiff Park, Benziger & Co. was embarking or starting in a new venture in the matter of California wine, that is, were seeking to launch a new enterprise, and that they have not proved to your satisfaction that they can show, as a means of measurement, past profits in substantial dealing in California wine under their label and through their past experience, if they had any, in such dealing in California wine, then I instruct you that you should not, and the law says you cannot, award them anything for supposed loss of anticipated profits, because the fact of profits to be realized from a business about to be launched can exist only on paper and while profits may be possible, losses in the enterprise are just as possible, and in either case they are nothing more than contingent probabilities, and of too uncertain a character to constitute a basis for the computation of damages for the breach. The rule is the same regardless of whether the plaintiff had not previously conducted the business at all, or whether an established liquor business was simply adding a new line of merchandise, such as adding a new line of California wine.”

To that refusal we excepted as follows, R. 493-495:

“We except to the refusal to our request No. 32 in that in none of the requests on either side that you

¹For Statement of Points and Designation of Printing, see R. 546.

indicated you were going to give is there any instruction to the jury upon this matter in the case.

The Court. What is it?

Mr. Naus. The matter of whether or not as to the Bereut wine, the labeling of it under their own label and starting out with that whether the Park, Benziger Company were starting out with a new venture, putting it in the field of speculation. We except to the refusal of that request because——

The Court. Isn't that covered by 31?

Mr. Naus. I will have to look at that.

The Court. I have had these instructions so long I want to be sure that I do not become confused.

Mr. Naus. It deals with the same field as 31, except 31 deals with the matter of speculation generally, but 32 deals with the more narrow question that the evidence deals with.

The Court. Isn't that dealt with generally? When you say conjecture and speculation you have said everything you can about it.

Mr. Naus. I doubt it, because when we are dealing with a new business or a new branch of an old business, and the jury have the case given to them, knowing the court knows it could be found to be a new business or a branch of an old business, they may think they have been invited by the court to consider that they could grant damages.

The Court. Only in this sense, that they are engaged in the business of marketing or selling California wine. They were in the wine business. They imported wine. They sold whisky. They could be described as a new branch or a new venture related to California wines.

Mr. Naus. We will except to the refusal to give our Request No. 32 in that in no other instruction and in no other request is the jury being instructed on the narrow question with respect to an attempt to claim expected profits in a new enterprise."

III. The Court below erred in refusing our Instruction Request No. 34, R. 60-61, to-wit:

“I further instruct you that even though lost profits be proved with reasonable certainty, nevertheless you must not award them unless you find from the evidence that on the 29th day of January, '1943, at the time the contract was entered into, the defendants Bercut then knew that if they did not thereafter deliver the wine it could not be obtained elsewhere; and if at the time of entering into the contract they did not have that knowledge, it is immaterial whether either or both of the Bercuts thereafter, and before non-delivery or refusal to deliver, learned or knew that the wine could not be obtained elsewhere. The only award of damages permitted by the law for breach of a contract of sale by a seller are such damages as may be fairly said to have been known at the time of contracting to be the probable result of a breach of contract by the seller, which requires the existence and proof of the fact that at the time of contracting the seller knew that the goods could not be thereafter procured elsewhere in the market.”

To that refusal we excepted as follows, R. 495:

“We except to the refusal to give defendants' request No. 34 in that in refusing to give that request the court is taking entirely out of the case the rule of *Hadley v. Baxendale* with respect to the knowledge or ignorance at the time of the contract of January 29th as modified by the modification of February 3, 1943, with respect to whether either or both of the Bercuts had knowledge or were ignorant at that time that if they thereafter did not deliver the wine it could not be obtained elsewhere; that we consider the jury is entitled to be instructed upon that subject. We know nothing in form or substance in the request

as given in any way contrary to law, and by refusing that request the court is refusing to instruct the jury on that subject."

IV. The court below erred in refusing our Instruction Request No. 37, R. 63, to-wit:

"I further instruct you that you must consider the fact that because no wine was delivered under the contract to the plaintiff it follows that the plaintiff was relieved from business hazard and responsibility in handling and disposing of the wine over a period of years, and was freed from any risks involved, and from time and trouble. From the award, if you make any, to the plaintiff, you should make a reasonable deduction from any arithmetical or calculated amount of net profits, because of that release and freedom from risk, hazard and responsibility, and saving from expenditure of time, trouble and energy over the period of time originally contemplated for completion of delivery in monthly installments. The amount of such deduction is not fixed in any particular percentage by the law which leaves it to the good sense and wisdom of an intelligent jury."

To that refusal we excepted as follows, R. 495:

"We except to the refusal to give defendants' request No. 27 in that in refusing that request the court is refusing to tell the jury at all that they may take into consideration the freedom from hazard and responsibility and risk of the plaintiff that the non-performance by the defendant has afforded.

Mr. Brownstone. That is 37.

Mr. Naus. 37, yes. That that is the only instruction upon the subject, so far as I know, it is proper in form and substance, and by the refusal of that request No. 37 it would appear to us that the court is refusing to instruct at all upon that subject."

V. The Court below erred in modifying our Instruction Request No. 35, by refusing to give the portion thereof italicized below, R. 61-62:

“The term ‘profits’, as I have used it in these instructions, does not mean gross profits. ‘Gross profits’ are really not profits at all within the contemplation of the law, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. If a buyer is entitled to an award at all because of loss of profits, the award must be confined to net profits. ‘Net profits’ are the gains from sales after deducting the expenses of doing business, together with the interest on the capital employed. *In addition to those deductions you must also deduct the 50% selling commission which was to have been paid by the plaintiff to Serge Hermann because that would be clearly a selling expense of the plaintiff if Serge Hermann were only an employe or salesman on commission instead of a partner or joint adventurer.*”

VI. The Court below erred in failing to give any instruction upon the burden of proof. In the course of settlement of the instructions, pursuant to Rule 51 FRCP, R. 471, the following occurred: The Court began by stating which of the requests on both sides would be given, modified, or refused, and then stated, R. 472:

“These instructions will be followed by what I call our stock instructions. Those instructions are the instructions usually given by the court in civil cases with which both sides are familiar.”

Thereafter, at R. 505-506, in the course of settling Defense Request No. 36, the following occurred:

“The Court. Referring to the defense request No. 36, yesterday I stated that I expected to give that

instruction. I now advise counsel that I will give the instruction, but I shall delete therefrom the following: 'And the burden of proof is on the plaintiff.' That is the last clause or phrase in the instruction. You may have an exception to that, Mr. Naus, of course.

Mr. Naus. No, I don't think so, your Honor, because I take it in your stock instruction you will deal with the burden of proof, so I take no exception to that deletion.

The Court. Very well."

However, in the charge to the jury the Court did not give the jury the stock instruction, nor any instruction, on the burden of proof.

VII. The Court below erred in not instructing the jury that the maximum OPA markup was 25 percent, in response to the inquiry received by the Court from the jury during their deliberations. After the jury had retired to deliberate on their verdict, but before returning the verdict, the Court made the following announcement, R. 526:

"(The jury retired at 11:00 a.m., and at 2:25 p.m. court was convened in the absence of the jury.)

The Court. I received a request from the jury which reads as follows: 'Please get us copy of OPA price regulation on retail and wholesale prices effective sometime during August, 1943.' "

Appellants made the following request with respect to a special instruction with respect to the inquiry, which request was not granted, R. 535:

"Mr. Naus. (continuing)——and we would suggest that, in accordance with your judicial knowledge of the regulation in question, that you, under the circumstances, give to the jury an additional or special instruction stating to them that beginning as of August

9, 1943, and continuing down to the present time there is a percentage markup maximum of 25 per cent on the sale by Park-Benziger of this wine to anybody, either wholesaler or retailer, or to anyone, not for consumption.”

VIII. The Court below erred in giving, R. 518, plaintiff’s proposed Instruction No. 10, reading, R. 32:

“You are instructed that the defendants have raised the defense of plaintiff’s alleged inability to pay for wine which the plaintiff purchased under the contract. You are instructed that the defendants were not justified in repudiating the contract unless the plaintiff were actually insolvent. The burden of proving such a defense is on the defendants. You are instructed that no evidence has been offered tending to show that the plaintiff is or ever was insolvent. Mere doubts of the solvency of the other party afford no defense to the party who refuses to perform the contract according to its terms because of such suspicion.”

Appellants excepted to the giving of that instruction, as follows, R. 501-502:

“We except to the giving of plaintiff’s instruction No. 10 upon the ground, first, that it speaks of the plaintiff’s ability or inability as being a matter of defense for a defendant. On the contrary, we say that in every case where a plaintiff sues for a breach of contract, one of the implications of his complaint and one of the elements of his position is that he be at all times able to perform, and that shifts the burden that rests upon a plaintiff to make a showing of ability into a defense upon the defendant of showing an inability.

We except to the instruction further upon the ground that regardless whether the burden is upon the plaintiff or upon the defendant the Court instructs

the jury that it is not necessary for the plaintiff to have had 'ability to perform independently of the credit that would obtain by getting the wine through performance by the other party. And we except to the instruction on the further ground that the Court not only puts the burden of a showing of inability on the defendant, but makes that be tested by the presence or absence of insolvency.'"

I.

THE COURT BELOW ERRED IN DENYING THE DEFENSE MOTION FOR A DIRECTED VERDICT UNDER THE SEVENTH GROUND OF THE MOTION. (SPECIFICATION OF ERROR I.)

The seventh ground of the motion for a directed verdict was that the evidence fails to show that when the contract was entered into either or both of the defendants Bercut knew that the goods were not obtainable elsewhere in the event of non-delivery by them. That is an essential element of the case for lost expectancy of profits attempted to be sustained by the plaintiff. The evidence is clear, positive and uncontradicted that appellants were ignorant of the fact at the time the contract was made, and Hermann, who knew the fact, gave them no notice or warning. The controlling statute, *Uniform Sales Act*, § 67 (*Calif. Civil Code*, § 1787),² was the basis of the decision in *Mar-*

²"§1787. Action for failing to deliver goods. (1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is

cus & Co. v. K. L. G. Baking Co. (N.J., 1939), 3 Atl. (2d) 627, wherein the highest Court of New Jersey affirmed a judgment nonsuiting a buyer on facts identical in legal effect with the facts at bar. The plaintiff-buyer had bought bakery ovens for resale at a profit in the ordinary course of business. There was non-delivery by the seller, and the buyer was unable to obtain ovens elsewhere in the market. The seller-defendant, like the appellants here at bar, had never previously sold any merchandise of the kind covered by the contract. *Inter alia* the Court said (3 Atl. (2d) at 631, col. 2, and 632):

“And so the seller of goods is under a duty to respond in damages for such losses as would probably result in the ordinary course of things from a breach of the contract under the special circumstances known to the parties at the time it was made. Such are ordinarily considered by the law as reasonably within the contemplation of both parties to the contract. Where the special circumstances are not known to the party chargeable with the breach, the law deems—again drawing from the opinion of Baron Alderson—that he ‘had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract,’ and his liability is measured accordingly. *Hadley v. Baxendale*, [9 Exch. 341] *supra*; *Pope v. Ferguson*, 82 N.J.L. 566, 83 A. 353; *Holland v. Jones-Howe Co.*, 98 N.J.L. 787, 121 A. 725; *Weiss v. Revenue Building & Loan Assn.*, 116 N.J.L. 208, 182 A. 891, 104 A.L.R. 129; *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 47 L. Ed. 1171; *Williston on Contracts* (Rev. Ed.), sections 1347, 1355, et seq. * * *

the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. [Added by Stats. 1931, p. 2255.]”

And it would seem that where (as plaintiff asserts was the case when the second contract of May 5th was made) the probability of an immediate resale was in the contemplation of the seller, he is liable for the natural consequences of a breach under such special circumstances. But, in the event, it is requisite, to render the seller liable for such special damages as are here claimed to have resulted from the buyer's inability to perform his sub-contract, that the seller knew, at the time of the making of the principal contract, that goods of like kind could not be procured elsewhere by the buyer for the performance of his sub-contract, and that therefore the injury thus resulting was within the contemplation of the parties as the probable consequence of a breach of the principal contract. Williston on Contracts, Rev. Ed., sec. 1347; A.L.I. Contracts, sec. 330; *Globe Refining Co. v. Landa Cotton Oil Co.*, supra; *Czarnikow-Rionda Company v. Federal Sugar Refining Company*, 255 N.Y. 33, 173 N.E. 913, 88 A.L.R. 1426.

There is nothing to suggest that the parties here contemplated inability of the buyer to obtain equipment elsewhere for the performance of such resale contract as it might make; rather the contrary. Defendant was a mere baker, unfamiliar with the equipment market; and plaintiff, although conversant with the trade conditions, did not, at or prior to the making of either contract, communicate to defendant the utter lack of such a market—if such was the case—for the fulfillment of its prospective sub-contract, if defendant should default in the performance of the principal contract; and so the special damage claimed to have been sustained was not within the contemplation of the parties as the likely consequence of the breach of contract pleaded. Indeed, plaintiff, in the early part of June, 1937, looked to 'the open market' for ovens, but found there was not 'an available market for the purchase of Fish 16-foot rotary ovens.'

In this connection, it is worthy to note that, while the contracts in suit provided for the sale of sixteen-foot ovens, and for delivery on May 15th, if plaintiff's version of the transaction be adopted, the resale contract (dated May 5th) obligated plaintiff to make 'immediate delivery' of three eighteen-foot ovens.

This principle is implicit in Section 67 of the Uniform Sales Act of 1907 (4 Comp. St. 1910, p. 4663, R.S. 1937, 46:30-73), providing that, where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered. This section follows Section 51 of the English Act, and seems to conform to the common law rule. *Cruthers v. Donahue*, 85 Conn. 629, 84 A. 322, Ann. Cas. 1913C, 221; *Bartolotta v. Calvo*, 112 Conn. 385, 152 A. 306; 1 U.L.A., p. 370, et seq. It is the principle generally applied. Williston on Contracts (Rev. Ed.), sec. 1347. And if the spirit of the Uniform Sales Act, R.S. 1937 46:30-1 et seq., is to be served, uniformity of interpretation is required.

Whether it be regarded as founded in the common consent of the parties, or as quasi-contractual in nature, it is an obligation imposed by the law on the guilty party to answer in damages for the reasonably foreseeable consequences of his breach. He is not justly chargeable with a greater liability than was contemplated by the parties; for, in a case such as this, it is his undoubted right, by express provision, to alter the standard for the admeasurement of damages in the event of a breach, i.e., to stipulate for an enlargement or curtailment of the liability thus imposed, or even for liquidated damages, regardless of the loss actually suffered. *Globe Refining Co. v. Landa Cotton Oil Co.*, supra."

The foregoing case is squarely in point and is, so far as a diligent search discloses, the only case in point under the Sales Act. It should control the decision at bar, for a number of reasons:

1. The rule of interpretation of the Sales Act is laid down by *Calif. Civil Code*, § 1794 (Sales Act, § 74), which says:

“This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.”

Speaking of Sales Act, § 74, the draftsman has said (*Williston, Sales*, § 617, pp. 1032-3):

“Section 74 is not contained in the English act, and introduces a new principle of interpretation which it is hoped the courts may carefully regard. Generally when a part of the law is codified, the courts in considering the effect of the Code have regard to the law of the jurisdiction as it existed before the passage of the Code. And if the Code appears to have been intended not as remedial legislation, but rather to state in exact form law previously existing, the implication is strong that the rule of the Code is similar to that previously in force. **The primary purpose of the Sales Act is to introduce uniformity**, and though in the main it purports to state law previously existing, it is not the law of any one State, but, where the law in the several States differs, what may be regarded as the better doctrine. Accordingly no inference is permissible that the law of any particular State is intended to be codified. The law of all the States must be considered, and the purpose to unify that law must be borne in mind.”

2. Independently of the legislative command of uniformity of interpretation under Civil Code, § 1794, uniformity is the clear rule of judicial decision in California.

Prior to the adoption of the Uniform Sales Act in 1931 (Stats. 1931, p. 2234; Civil Code, §§ 1721-1800), the legislature had in 1917 adopted the Uniform Negotiable Instruments Act (Stats. 1917, p. 1531; Civil Code, §§ 3082-3266d), and in the judicial decisions thereunder the rule has become clear that uniformity of interpretation is paramount over ordinary rules of interpretation. This was first laid down in 1919 by Justice WILBUR, who spoke for the Supreme Court of California, in *Utah State Nat. Bank v. Smith*, 180 Cal. 1, 179 Pac. 160, where he said (180 Cal. at 3):

“It is generally held that it is the **duty of the courts** in construing this law to have in mind the purpose of securing uniformity in the law of commercial paper. *State Bank, etc. v. Bilstad*, 162 Iowa 443, 136 N.W. 204, 144 N.W. 363, 49 L.R.A. (N.S.) 132; *Felt v. Bush*, 41 Utah 462, 126 Pac. 688; *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N.E. 679, Ann. Cas. 1913C, 525; *Broderick v. McGrath*, 81 Misc. Rep. 199, 142 N.Y. Supp. 497; *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 83 N.E. 392, 14 L.R.A. (N.S.) 842.”

And he then quoted a passage from a case from another jurisdiction, with respect to the need of uniformity of decision, wherein the following ground was taken:

“The question is one of business expediency, and not of logic or equity as applied to an individual case.”

The Appellate Courts of California have steadily adhered to the rule: *Security Commercial and Savings Bank v. Southern Trust and Commerce Bank*, 74 Cal. App. 734, 761, 241 Pac. 945, 956, col. 1; *Charles Nelson Co. v. Morton*, 106 Cal. App. 144, 149, 288 Pac. 845, 847; *People's Finance & Thrift Co. v. Shaw-Leahy Co.*, 214 Cal. 108, 111-112, 3 Pac. (2d) 1012, 1013, col. 2; *Pratt v. Hopper*, 12

C.A. (2d) 291, 294, 55 Pac. (2d) 517, 519, col. 1. "Uniform laws must necessarily fail of their purpose, unless there is uniformity in their interpretation and application", *Charles Nelson Co. v. Morton*, supra. In the case of *Pope v. Ferguson* (1912), 82 N.J. Law 566, 83 Atl. 353, 355, col. 2, the Court said concerning the Uniform Sales Act:

"The primary purpose of the codification as expressed in its title was to make uniform the law concerning the sale of goods. Any construction of the statute, therefore, which would throw it out of harmony with rules of law generally prevailing, relating to that subject, would be in direct violation of its expressed object. It is consequently necessary to ascertain whether there is any generally accepted rule existing in other jurisdictions, prescribing the measure of damages in actions by the vendee, for failure to deliver the goods, where he has made a contract for the resale thereof."

The Court then reviewed *Hadley v. Baxendale*, 9 Ex. 341, *Benjamin on Sales*, § 1237, and 24 A. & E. Ency. Law 1155, and concluded:

"There can be no recovery of profits on special contracts of resale made **after** the contract of purchase. This being the state of the law at the time of the codification of the law of sales by our Legislature, and the purpose of that codification being to make uniform the law relating thereto, we are entirely clear that it was not the intention of the Legislature to except from the general rule of damages declared in the sixty-seventh section of the act cases in which, after the making of a contract for the sale of goods, the buyer has made a contract for the resale thereof."

When, 19 years later, the legislature of California "adopted" the statute it adopted that interpretation with it. 23 *Cal. Jur.* 794, § 172.

3. The opinion in the New Jersey case, *supra*, under Sales Act, § 67, is based upon the fundamental rule in the landmark case of *Hadley v. Baxendale* (1854),³ 9 Ex. 341, 156 Eng. Reprint 145, 26 Eng. L. & Eq. 396. That leading case was adopted into the law of California in the case of *Mitchell v. Clark* (1886), 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529, and has been steadily followed in California⁴ since. The clear and sound black and sound black-letter statement in *McCormick on Damages*, § 138, p. 562, reads:

“The leading case of *Hadley v. Baxendale* lays down the rule that damages for breach of contract can be recovered only for such losses as were reasonably foreseeable, when the contract was made, by the party to be charged. In other words, such losses must be either of the type usually resulting from breach of like contracts, or, if unusual, the circumstances creating the special hazard must have been communicated to the defaulter before he made the bargain.”

Inter alia in *Mitchell v. Clark*, *supra*, the Court said (emphasis ours):

“This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because, in the usual course of events, the purchaser could have supplied himself with like commodities at the market price. And if special circum-

³For an excellent history and explanation of “The Rule of *Hadley v. Baxendale*”, see *McCormick on Damages* (1935), §138, p. 562 et seq.

⁴E.g., *Hunt Bros. Co. v. San Lorenzo Water Co.*, 150 Cal. 51, 87 Pac. 1093, L.R.A. N.S. 931, where the Supreme Court said that under our Civil Code, *Hadley v. Baxendale* “has been universally accepted and followed (150 Cal. at 56). “The rule in *Hadley v. Baxendale* has been discussed in a multitude of cases and generally followed”, *Overstreet v. Merritt*, 186 Cal. 494, 503, 200 Pac. 11, 15 (quoting the rule).

stances existed, entitling the purchaser to greater damages for the defeat of a special purpose, known to the contracting parties, (as, for example, if the purchaser had already contracted to furnish the goods at a profit, **and they could not be obtained in the market**), such circumstances must be stated in the declaration, with the facts which, under the circumstances, enhanced the injury. 1 Suth. Dam. 764.”

It is in the rule in *Hadley v. Baxendale* that supplies “the distinction between damages for breach of contract, and damages for tort”, *Hunt Bros Co. v. San Lorenzo Water Co.*, 150 Cal. 51, 56, 87 Pac. 1093, 1095, col. 2.

4. The opinion in the New Jersey case, *supra*, under Sales Act, § 67, also cites *Williston, Contracts*, § 1347. In that section Williston said:

“When a defendant has been notified, before entering into the contract in question, of facts indicating that unusual damages will follow or may follow his failure to perform his agreement, he is liable for such damages. Common consequential damages of this sort are those suffered from loss of a resale. The defendant may have had notice of a sub-contract but not of the price at which the resale was to be made. In such a case he will be liable for such ordinary profit as might be expected on a resale. Even though no contract for a resale had yet been made by the buyer, damages may be recovered for loss of one, if the probability of such a resale was contemplated, **and defendant knew that other goods of the kind contracted for could not be obtained by the buyer.**”

In subsequent sections, § 1356, “The rule in *Hadley v. Baxendale*”, and § 1357, “Basis of the rule in *Hadley v. Baxendale*”, Williston discusses the matter further.

5. The opinion in the New Jersey case, *supra*, under Sales Act, § 67, also cites American Law Institute, *Restatement, Contracts*, § 330. That section reads:

“§ 330. In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, **it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.**”

6. The opinion in the New Jersey case, *supra*, under Sales Act, § 67, also cites *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 47 L. Ed. 1171, which has since become a leading American case, as a glance at Shepard's citations will show. Therein, Mr. Justice Holmes rationalized the rule of *Hadley v. Baxendale* and found its true basis in the theory of contract. He said (in the following passage, later written into the text of *Williston, Contracts*, § 1356), in 190 U.S. at 543:

“It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and, in many cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind.”

The case has been cited with approval by the Supreme Court of California, *California Press Mfg. Co. v. Stafford*

Packing Co., 192 Cal. 479, 486, 221 Pac. 345, 347, col. 2.

Mr. Justice Holmes further stated (190 U.S. 544-545):

“The question arises, then, What is sufficient to show that the consequences were in contemplation of the parties, in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. *Messmore v. New York Shot & Lead Co.*, 40 N.Y. 422. See *Sawdon v. Andrew*, 30 L. T. N. S. 23. But, in the language quoted, with seeming approbation, by Blackburn, J., from *Mayne on Damages*, 2 ed. 10, in *Eblinger Actien-Gesellschaft v. Armstrong*, L.R. 9 Q.B. 473, 478, ‘it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability.’ Mr. Justice Wiles answered this question, so far as it was in his power, in *British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499, 500: ‘I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. * * * If that [a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff’s trade should prove successful and without a rival] had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting he would at once have rejected it. And though he knew, from the shippers, the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. **The knowledge must be brought home to the party sought to be charged, under such**

circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.' The last words are quoted and reaffirmed by the same judge in *Horne v. Midland R. Co.*, L. R. 7 C. P. 583, 591; S. C., L. R. 8 C. P. 131. See also Benjamin, Sales, 6th Am. ed. § 872.

It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as a matter of law to charge the seller with special damage on that account if he fails to deliver the goods."

7. The opinion in the New Jersey case, *supra*, under Sales Act, § 67, also cited *Czarnikow-Rionda Co. v. Federal Sugar Refining Co.*, 173 N.E. 913, 255 N.Y. 33, 88 A.L.R. 1426, a decision in the state wherein the present plaintiff Park, Benziger & Co. has its office. In that case, relating to the sale of sugar, a judgment of over \$400,000 in favor of a buyer was reversed because of a failure to show a special knowledge by the seller at the time the contract was made. The Court after discussing *Hadley v. Baxendale* and other leading authorities, said *inter alia* (173 N.E. at 916):

"Notice of the special circumstances which may cause special damage to the buyer must be had by the seller at the very time when he contracts to sell. There must be notice 'at the time of or prior to contracting.' *Chapman v. Fargo* [223 N.Y. 32] *supra*. 'No notice to the seller thereafter would increase his liability.' Per Lehman, J., in *Goldstone v. Wade*, (Sup.) 123 N.Y.S. 114, 115. 'The consequences must be contemplated at the time of the making of the contract.' Per Holmes, J., in *Globe Refining Co. v. Landa Cotton Oil Co.*, *supra*. 'No doubt notice subsequent to the formation of the contract, though prior to the breach, is insufficient.' Williston on Contracts, § 1357. The seller must

have 'notice **when the contract was entered into** that the loss in question would be a natural consequence of the breach.' *Id.* § 1355.

'Even though no contract for a resale had yet been made by the buyer, damages may be recovered for loss of one, if the probability of such a resale was contemplated, and defendant knew that other goods of the kind contracted for could not be obtained by the buyer.' Williston, § 1347. 'The true distinction seems to be: **If besides notice of contemplated resale the defendant also had notice that other goods could not be obtained to supply the place of those not delivered—then the profits of a resale may be recovered; if there was no such notice it would be held that loss of profits of a resale was not within the contemplation of the parties.**' Sedgwick on Damages, § 162. The cases of *Hammond & Co. v. Bussey*, 20 Q.B. Div. 79, *Delafield v. J. K. Armsby*, [116 N.Y.S. 71] *supra*, and *Carleton v. Lombard, Ayres & Co.*, 149 N.Y. 137, 43 N.E. 422, relied upon by Czarlikow, serve but to emphasize the very rule thus stated."

8. The opinion in the New Jersey case, *supra*, under Sales Act § 67, is soundly within the very text of the rule "laid down by Baron Alderson in the leading case of *Hadley v. Baxendale*"⁵ which reads:

" 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to

⁵*American Surety Co. v. Wheeling Structural Steel Co.*, 4 Cir., 114 F. 2d 237, 239; therein after quoting the foregoing passage from *Hadley v. Baxendale*, the Court said: "This is the classical statement of the rule applicable in case of damage arising out of breach of contract, now generally accepted here and in England. 15 *Am. Jur.* 451."

have been in the contemplation of both parties, **at the time they made the contract**, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.' "

At bar the contract was for sale of California wine. Before the present lawsuit, who ever heard of commercial blends of California wine not being available in the market? "Generally, and in the great multitude of cases" of breach by a seller of California wine there would be availability of the wine elsewhere in the market, and the damages would be measured by the excess, if any, of the market price over the contract price. In the absence of express liquidation of the damages in and by the contract itself (*Civil Code*, § 1671), the implication from the silence of the contract would be that the parties had impliedly contracted about the damages upon the basis of "the great multitude of cases not affected by any special circumstances". It requires an expression within or outside the written contract, i.e., a notice of "special circumstances" stated by the buyer to the seller and an acceptance thereof by the seller, at the time of contracting, to introduce a different measure. The notice and acceptance established

the "contemplation" by the parties of the possibility of damages differing from the measure in the "great multitude of cases".

II.

THE COURT BELOW ERRED IN REFUSING TO GIVE THE INSTRUCTION IN DEFENSE REQUEST NO. 34.

The requested instruction, and the exception to the refusal to give, are set out in Specification of Error III. We have argued under the next preceding head that a verdict should have been directed for defendants under the seventh ground of the motion for a directed verdict. However, if the Court rules that the record does not raise the question of law favorably to appellants, then the question of fact should have been submitted to the jury whether appellants knew at the time the contract was entered into that if they did not thereafter deliver the wine it could not be obtained elsewhere. Therefore, without repetition hereunder, we here incorporate the points, authorities and argument under the seventh ground of the motion for a direction. The case went to the jury exclusively on the theory of loss of expected profits because of unavailability of wine in the market, and in that context Defense Request 34 read, R. 60-61:

"Defense Request No. 34

I further instruct you that even though lost profits be proved with reasonable certainty, nevertheless you must not award them unless you find from the evidence that on the 29th day of January, 1943, at the time the contract was entered into, the defendants Bercut then knew that if they did not thereafter deliver the wine it could not be obtained elsewhere; and if at the time of entering into the contract they did not have that knowledge, it is immaterial whether

either or both of the Bercuts thereafter, and before non-delivery or refusal to deliver, learned or knew that the wine could not be obtained elsewhere. The only award of damages permitted by the law for breach of a contract of sale by a seller are such damages as may be fairly said to have been known at the time of contracting to be the probable result of a breach of contract by the seller, which requires the existence and proof of the fact that at the time of contracting the seller knew that the goods could not be thereafter procured elsewhere in the market."

III.

THE COURT BELOW ERRED PREJUDICIALLY IN ITS RULINGS REGARDING THE RIGHT OF APPELLEE TO RECOVER CONJECTURAL LOSS OF ANTICIPATED PROFITS.

(a) Preliminary statement.

In our statement of the case, we have set forth in detail the proof offered by the appellee of damages suffered by it.

The jury was charged (R. 520) that since the wine was not obtainable elsewhere in the market, appellee was entitled to recover either its outlay of expense in preparing to carry out the contract or its net profit. Appellee offered no proof of the amount of its outlay, and appellee's entire case was therefore directed to an attempt to recover profits. Although net profits rather than gross profits are the true measure of recovery, on analysis the proof offered by appellee purported to prove gross but not net profits.

As evidence of expenses to be incurred in the handling of the wine, appellee offered the testimony of Elman, unsupported by any books, records or documents, to the effect (1) that the freight on this merchandise from San Francisco would be 35¢ per case, and (2) that the over-

head on a sale at retail in New York would be 6% of the sale price and on a sale at wholesale 2% of the sale price. No attempt was made to prove the cost of washing and polishing the bottles and wrapping them in tissue and no attempt was made to prove the cost of labels to be supplied by plaintiff, the cost of capital to be employed, the value of Elman's services, etc.

As will hereinafter appear, the jury made no deduction for the expense of Hermann's services as a salesman with a 50% selling commission. Further, appellee made no attempt to prove the prices it would have been entitled to charge for this wine under the provisions of the Emergency Price Control Act. Despite the fact that the jury, after retiring to deliberate, evidenced their bewilderment at the state of the evidence respecting O.P.A. mark-ups and the instructions of the Court in regard thereto, the Court refused to inform the jury that the legal mark-up that could be charged by appellee was limited to 25% of its cost. (R. 526-541.)

Instead of proving its past experience in the sale of wines, both imported and domestic, and the percentage of profit realized on those sales, plaintiff relied on the unsupported speculation of Elman that all of the wine covered by the contract could have been sold in accordance with statements of proposed prices filed by plaintiff with the New York State Liquor Authority. There is, therefore, a total absence of evidence to support a judgment for profits.

Notwithstanding the foregoing state of the evidence, the Court, after advising counsel that the instructions to be given by it would include "our stock instructions" (R. 427) and thereafter in response to a statement of Mr. Naus indicated that the stock instructions would con-

tain an express instruction on burden of proof (R. 505-506), but utterly failed to give any instructions to the jury whatsoever with respect to burden of proof. Proper instructions prepared by appellants with respect to the measure of damages supported by authority cited in the instructions proposed were refused by the Court.

The size of the verdict can only be accounted for as the result of these cumulative and highly prejudicial errors.

(b) The evidence was insufficient to support a judgment for the recovery of profits.

The law respecting the right of a plaintiff to recover net profits is well settled. If plaintiff is embarking on an entirely new venture, or fails to show by evidence past profits in the sale of the same or similar goods, he cannot recover for a conjectural loss of anticipated profits:

Gibson v. Hercules Mfg. & Sales Co., 80 Cal. App.

689, 702, 252 Pac. 780, 785, and cases;

Note, 32 *A.L.R.* 120, at 153-156;

8 *Cal. Jur.* 777, Sec. 38;

Central Coal & Coke Co. v. Hartman, 8 Cir., 111 Fed. 96, 98-99;

Iron City Toolworks v. Welisch, 3 Cir., 128 Fed. 693, 695-696;

California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, at 485 (and cases there cited), 221 Pac. 345, 347, 32 *A.L.R.* 114, 117-118 (distinguished in *Natural Soda Products Co. v. Los Angeles*, 23 Cal. (2d) 193, 143 Pac. (2d) 12, 17);

Terre Haute Brewing Co. v. Dwyer, 8 Cir., 116 F. (2d) 239, 242, Col. 2;

Thrifty Wholesale Inc. v. Malkmillion Corp., 50 F. Supp. 998, and cases at 1000.

It is not enough for a plaintiff to testify that in his opinion there was strong demand for the product agreed to be sold and that he could have sold the product at a profit. Such speculations on the part of plaintiff's witness are no better than the speculations of a jury. Evidence of past profit experience must be furnished:

Central Coal & Coke Co. v. Hartman, 111 Fed. 96 (C.C.A. 8);

Iron City Toolworks v. Welisch, 128 Fed. 693 (C.C.A. 3);

Terre Haute Brewing Co. v. Dwyer, 116 Fed. (2d) 239 (C.C.A. 8);

Coates v. Lake View Oil & Refining Co., 20 Cal. App. (2d) 113;

Salaban v. East St. Louis Co., 1 N. E. (2d) 731 (Ill.).

See also,

Stephany v. Hunt Brothers, 62 Cal. App. 636;

Austin v. Roberts, 130 Cal. App. 328.

It is incumbent upon the plaintiff in such an action to prove all of the elements which are required in order to determine its net profits. "Gross profits" are really not profits at all. He can only recover his net profits, which are the gains made from sales, after deducting the value of the labor, materials, rents and all expenses, together with the interest on the capital employed:

Coates v. Lake View Oil & Refining Co., 20 Cal. App. (2d) 113;

Landon v. Hill, 136 Cal. App. 560;

Columbus Mining Co. v. Ross, 218 (Ky.) 98, 290 S.W. 1052; 50 *A.L.R.* 1394, and Note at 1397.

Defendant is under no duty to prove any of the elements which go into the determination of plaintiff's net

profit. In other words, the rule is not that plaintiff proves its gross profit and then defendants offer evidence of expense from which to determine net profit. Plaintiff must prove both the gross and net profit and defendant is under no duty to furnish evidence thereof:

Mahana v. Los Angeles Co., 82 Cal. App. 710;

Central Coal & Coke Co. v. Hartman, 111 Fed. 96
(C.C.A. 8).

Testing the evidence offered by appellee by the foregoing rules of law, it is apparent that the evidence offered to the jury was evidence of purported gross, but not of net profit. The amount of the gross profit was based not upon the past experience of appellee in dealings in California wine (although Elman testified that in the year prior to the trial plaintiff had dealt in approximately 10,000 cases of California wine, a not unsubstantial amount), but upon Elman's unsupported assertion that these wines could have been sold to the retail trade in New York at a mark-up of about 100% of their cost to appellee. The only evidence of expense offered was the unsupported speculation of Elman that regardless of the volume or amount of business done, the overhead on retail sales would average 6% of the sale price and the overhead on wholesale sales 2% thereof. No evidence was offered of the expenses incurred by Elman and Hermann traveling to San Francisco in order to carry out the contract; no evidence was offered respecting the cost of washing, polishing and wrapping the wine bottles; no evidence was offered respecting the value of Elman's services or of any of the other employees or salesmen of appellee, or of capital employed. No attempt was made by appellee to offer evidence of the price at which the wine could have legally been sold under the Emergency Price Control Act and in spite of its request, the jury

was left to speculate upon ambiguous and misleading testimony given on cross-examination of appellee's witnesses. The only evidence of damages offered was the testimony of Elman plus the worthless testimony of the witnesses, Cholet (R. 231 et seq.) and Lusinchi (R. 253 et seq.) to the effect that a shortage in wine had developed and the market was going up. How or in what manner this testimony could establish the actual dollar loss of appellee, which is all appellee is entitled to recover herein, was not made clear.

At the close of all of the evidence, appellants moved for a directed verdict upon the grounds, among others, that the evidence did not prove with reasonable certainty that appellee suffered a loss of anticipated profits; further, that although the evidence showed that appellee during 1942 had handled an aggregate of 8000 or 9000 cases of wine, no showing of the profits realized upon the sale of that wine was made; further, that although in 1943 appellee had purchased from defendant 3250 cases of Chianti type wine, no evidence was offered with respect to the profits made on these sales; further, because no evidence was offered showing the cost of washing the bottles and wrapping them in tissue, although appellee intended to perform this service, nor was any evidence offered of what capital would be used by appellee in carrying out this transaction and the amount of interest paid upon such capital. (R. 466-470.) The motion for directed verdict was proper and under the authorities hereinbefore set forth should have been granted.

Appellee either deliberately or inadvertently left the matter of its loss of profits to the field of speculation and conjecture. Under such circumstances the motion for directed verdict should have been granted.

(c) **The Court below erred in failing to instruct on burden of proof.**

Under our specification of error VI we have set forth the proceedings respecting the giving of instructions on burden of proof. Nowhere in the instructions given by the Court is there any instruction respecting the burden of proof or the definition of what constitutes a preponderance of evidence. Appellants failed to except to the action of the trial Court in deleting the last sentence from their instruction No. 36 for the reason, as stated by Mr. Naus, that they assumed that the stock instruction on burden of proof would cover the matter deleted. (R. 505-506.) The importance of this error of the trial Court cannot be overestimated.

When the California codes were originally enacted in 1872, Section 2061, Code of Civil Procedure, provided that the jury were to be the judges of the effect or value of the evidence addressed to them but that they were to be instructed by the Court on all proper occasions with respect to seven propositions which they should bear in mind in weighing the evidence. Proposition 5 reads as follows:

“That in civil cases the affirmative of the issue must be proved and when the evidence is contradictory the decision must be made according to the preponderance of evidence;”

Failure to instruct with respect to these matters where such failure is prejudicial, is ground for reversal.

Scarborough v. Virgo, 191 Cal. 341.

The unsatisfactory nature of the evidence with respect to appellee's lost profits has been heretofore pointed out. In the face of this evidence the failure of the Court to instruct at all on burden of proof was error prejudicial to appellants.

(d) **The Court below erred in refusing instruction request No. 32.**

Request No. 32 (R. 58), quoted in Specification II, was a correct statement of law, not covered by any instruction given. It told the jury that appellee could not recover lost profits in an entirely new venture in the absence of evidence of past profits in dealings in California wine. This evidence was available to appellee but it failed to produce the evidence. That the instruction correctly stated the law is supported by the following authorities:

Gibson v. Hercules Mfg. & Sales Co., 80 Cal. App.

689, 702, 252 Pac. 780, 785, and cases;

Note, 32 A. L. R. 120, at 153-156;

8 Cal. Jur. 777, Sec. 38;

Central Coal & Coke Co., v. Hartman, 8 Cir., 111

Fed. 96, 98-99;

Iron City Toolworks v. Welisch, 3 Cir., 128 Fed.

693, 695-696;

California Press Mfg. Co. v. Stafford Packing Co.,

192 Cal. 479, at 485 (and cases there cited), 221

Pac. 345, 347, 32 A. L. R. 114, 117-118 (disting-

uished in *Natural Soda Products Co. v. Los*

Angeles, 23 Cal. (2d) 193, 143 Pac. (2d) 12, 17);

Terre Haute Brewing Co. v. Dwyer, 8 Cir., 116 F.

(2d) 239, 242, Col. 2;

Thrift Wholesale Inc. v. Malkmillion Corp., 50 F.

Supp. 998, and cases at 1000.

(e) **The prejudicial error in not instructing the jury that the maximum OPA mark-up permitted plaintiff was 25 per cent.**

Loss of profits may not be considered as an element of damages where the business from which they would have resulted was, or would have been, conducted in violation of law.

Shelley v. Hart, 112 Cal. App. 231 at 242;

25 *Cor. Jur. Secundum*, page 519, damages, par. 42;

17 *Cor. Jur.*, page 797, damages, par. 119.

It is a matter of common knowledge that under the provisions of the Emergency Price Control Act and Executive Order No. 8734 of April 11, 1941, the Office of Price Administration and Civilian Supply has regulated the sale prices of most, if not all, commodities. It has been held that the regulations issued by the price administrator have the force of law and override provisions of contracts even though such contracts were made and executed prior to the passage of the particular regulation in question:

Long Island Structural Steel Co. v. Schiavone-Bonomo Co., 53 Fed. Supp. 505, affirmed, 142 Fed. (2d) 557 (C.C.A. 2);

In re Kramer & Uchitelli, Inc., 43 N. E. (2d) 493, 288 N. Y. 467;

Sanders v. M. Lowenstein Co., 45 N. E. (2d) 457, 289 N. Y. 702.

The only testimony offered with respect to OPA ceiling prices is the following Hermann testified:

“Q. Speaking of regulations, there is an OPA ceiling mark-up on wine, isn't there?

A. As far as I know, yes.

Q. Well, you know about it, don't you?

A. Well, as far as I know, there is an OPA mark-up on wines.

Q. A wholesaler like Park, Benziger could not mark it up over 25 per cent of their cost, could they?

A. A wholesaler like Park, Benziger—and again, I am not an authority on OPA matters—would have the right to determine the price according to the price that existed for a wine equivalent to the wine they were buying in March, 1942.

Q. And that was true only up to August 1943, wasn't it?

A. I believe so.

Q. In August 1943 their mark-up was specifically limited to 25 per cent over cost?

A. In August 1943.

Q. In August 1943, yes.

A. If the price had already been determined prior to August 1943, if I understand it right, that was the price.

Q. Any price determined before that had to be first approved, did it not, by OPA?

A. You mean prior to August 1943?

Q. Prior to August 1943.

A. Mr. Naus, I am sorry, but I am no expert on OPA matters and I really don't know."

Elman testified:

"Q. Having in mind that you tell us that you were in charge of the sales, posting of prices—you are familiar with that, an expert in that—perhaps I would not be presuming too much to assume that you know that in August 1943 the OPA put a ceiling on you; you know that, don't you? * * *

A. There is a revision—there is a revision constantly on OPA ceilings. At that particular time I don't recall what the ceiling was. Do you have the OPA revision of that month?

Q. I have something that looks like it. I will ask you whether or not in August 1943, beginning then and ever since——* * *

The Witness. If I have been qualified as an expert, maybe I will get a job.

Mr. Naus. No, I am not trying to qualify you as anything—as an expert in that respect. I am merely meeting on cross-examination what you purport to say on direct examination, Mr. Elman. At that I think you are doing as well as many of them down at the OPA, as I have observed them. I am asking you whether you know that in the month of August 1943,

beginning then and continuing ever since, you have been under an OPA ceiling of 25 per cent in your mark-up.

A. Yes.

Q. So that had this contract been carried out, under these price lists or anything else, for three months, beginning with the fourth car and continuing under this contract, you could in no event have sold at a greater mark-up than 25 per cent; now you know that, don't you?

A. No, I don't think so. At least, my understanding of it would be that since our price was established prior to this one, the price fixing of the merchandise took place before this law came out and subsequent to that. It differentiates—it says anything you purchase from this time on shall be at a fixed mark-up. Our contract and purchase of the wine happened prior to this. We had already established an OPA price on that merchandise. I doubt very seriously whether this would have meant a retention in price. So far as I am concerned, I don't believe it would have. We would have kept the same prices.

Q. Aside now from the New York State Authority price * * * had you prior to August 1943 ever established with the OPA any price?

A. Oh, yes.

Q. When and where and with whom?

A. When the OPA came out, when New York State took on the new Hallowell bill, a law which stated we had to submit the price to them the month preceding the month in which we were going to sell it, and when the OPA came out with prices, the Hallowell stipulated the top sheets of every distributor were to read that all prices submitted in New York State conformed with OPA price regulations, to which we attested, after we had gotten our price from OPA.

Q. Beginning with what date?

A. I don't recall the exact dates. It was prior to that when the OPA fixed the price of merchandise

in the liquor business. We filed the New York State schedule with that in mind. New York State required that qualification in the prices submitted to that.”

At the request of appellants the Court gave instruction No. 36 (R. 62-R. 520) deleting from the instruction the words “and the burden of proof is on the plaintiff”. The instruction as given read as follows:

“In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to determine net profits, I instruct you that you cannot in any event use a greater markup by plaintiff over the cost to it than the markup permitted under OPA regulations as a price ceiling.”

As a result of this incomplete record and the ambiguous instructions given, the jury sent a message to the Judge, after it had retired to deliberate, as follows:

“Please get us copy of OPA price regulation on retail and wholesale prices effective some time during August, 1943.” (R. 526.)

The portion of the record showing the disposition of this request is set forth in R. 526 to R. 541 and all of this portion of the record is of importance. The Court, after reviewing the situation and commenting upon the action of Mr. Bourquin, one of counsel for appellee, in violating the understanding of all parties, including the Court, that all objections to instructions under Rule 51 of the Rules of Civil Procedure were to be made before the jury was instructed, requested counsel to stipulate that certain portions of the transcript heretofore set forth might be called to the attention of the jury. (R. 533.) In answer to this request Mr. Naus, one of counsel for appellants, stated that of course any part of the transcript could be sent to the jury but that it was the

position of appellants that the Court had judicial knowledge of the regulations and that the regulation respecting the 25% mark-up was perfectly clear. In this connection Mr. Naus stated to the Court:

“In that connection and having that in mind we feel confident of our position as to judicial knowledge of the law and the application here, we think the regulation is perfectly clear on the subject—and we would suggest that in accordance with your judicial knowledge of the regulation in question that you under the circumstances give to the jury an additional or special instruction stating to them that beginning as of August 9, 1943 and continuing down to the present time there is a percentage markup maximum of 25% on the sale by Park, Benziger of this wine to anybody, either wholesaler or retailer, or to anyone, not for consumption. (R. 535.)”

After Mr. Naus had thus clearly made known to the Court the action which he desired the Court to take (F.R.C.P., Rule 46) the Court stated: “I will not do that at this time, Mr. Naus”. The Court then added “but if there should be any further request from the jury upon the suggestion I will entertain a request from you in that regard”. (R. 535.)

Therefore, despite the fact that the jury asked for specific information with respect to the OPA regulation effective during August 1943, the Court refused to give this information although a proper request was made by counsel for appellants that the jury be properly advised. As a result, the jury were left to speculate and conjecture on an issue of law about which they should have been advised by the Court. They were not even instructed that the burden of proof was upon the appellee and the verdict therefor was a calculation based on an insufficient and incomplete record and insufficient instructions.

It is obvious that what the jury did was to take the wholesale and retail price lists placed in evidence by appellee over the objection of appellants, accept the instruction of the Court that damages were to be computed on 22,191 cases, and then figure that half of these cases would have been sold at the retail list price and half at the wholesale list price. This error necessarily requires a reversal of the judgment, because the result of the error is that the damages of \$72,687.50 awarded by the jury are excessive, in that the evidence does not warrant or justify a verdict in any amount greater than \$29,432.85 if Hermann's 50% is not deducted, nor any amount greater than \$14,746.43 if his 50% is deducted.

The jury were limited to 22,191 cases (26,691 minus 4,500) as a basis for their award. (R. 522.) The award of \$72,687.50 is at the rate of \$3.27½ per case. The OPA ceiling is a markup of 25%. The three cars offered for cash at the contract prices would have carried the deliveries, one carload a month, into August, 1943. The basic Maximum Price Regulation covering Brewery, Distillery Winery Products, is MPR 445 of August 9, 1943. (8 Federal Register 11,161.) The regulations are published in the Federal Register, and the Congress has enacted that "The contents of the Federal Register shall be *judicially noticed*", 44 USC 307, last sentence, and published OPA ceiling prices are judicially known, *U.S. v. Lederer*, 7 Cir., 140 F. (2d) 136, 139, col. 2. It is therefore judicially known that appellee could not use a markup greater than 25%, and therefore that any verdict awarding a higher amount is contrary to law, is excessive to the extent that it exceeds 25%. In the regulation, MPR 445, the "maximum prices for sales of * * * packaged wine by wholesalers * * *" is embraced by Article V. (Secs. 5.1 to 5.10.) Under Section 5.4(b), "a wholesaler's maximum

price per case * * * shall be his net cost per case * * * multiplied by the percentage markup for the item being priced as follows: * * * (ii) 1.25 for wine'', i.e., one and one-quarter times the "net cost" or a markup of 25%. The elements of "net cost" are stated in Section 5.3(b) and, speaking generally, in the context at bar are (1) purchase price and (2) freight. Section 7.12, Definitions, says in (b)(3) that a "wholesaler" means "any person * * * engaged in the business of buying and selling * * * wine without changing the form thereof, to persons other than consumers'', which exactly describes Park, Benzinger & Co., and without regard to whether they sold at wholesale under their wholesale list, or at retail under their retail list.

At bar, the elements of "net cost", i.e., (1) purchase price and (2) freight, are as follows:

<u>Year</u>	<u>Dry</u>	<u>Sweet</u>
1943	\$5.25	\$6.00
1944	5.50	6.25

Those prices are f.o.b. San Francisco, which is the basis of Park, Benzinger & Co.'s quotations for sales at wholesale. (Plaintiff's Exhibit 15, wholesale price list for May, 1943. R. 316.) Their retail price list (Exhibit 14, R. 308) is f.o.b. New York, which brings in 35 cents a case for freight and handling. In sales at retail, therefore, their OPA elements of "net cost" adds 35 cents per case, making the cost (for markup purposes) the following:

<u>Year</u>	<u>Dry</u>	<u>Sweet</u>
1943	\$5.60	\$6.35
1944	5.85	6.60

With deliveries at the contract rate of one carload a month plus an extra holiday car, and allowing for the three cars admittedly offered for cash at the contract price, there

would be 22,191 cases (26,691 minus 4,500) as a basis of damages, or 6 cars of 1,500 cases each, or a total of 9,000 cases, shipped in 1943, and the remainder of 13,191 cases shipped in 1944. The maximum markup of 25% would be as follows:

<u>Year</u>	<u>Price</u>	<u>Markup</u>
1943	\$5.25	1.3125
1944	5.50	1.375

The expense of doing business (aside from Hermann's 50% selling expense) was 2% of selling price, after deducting which the following net profit (before deducting Hermann's 50% selling expense) per case would result:

<u>Year</u>	<u>Net Profit</u>
1943	\$1.285
1944	1.35

Applying those unit rates we reach *maximum* permitted net profits as follows:

<u>Year</u>	<u>Total</u>
1943— 9,000 cases at \$1.285	\$11,565.00
1944—13,191 “ “ 1.35	17,807.85
Total.....	\$29,372.85

Adding \$20.00 per car for loss of interest through paying cash in advance for the first three cars, results as follows:

4,500 cases, loss of interest	\$ 60.00
22,191 “ “ “ profits	29,372.85
26,691 cases	\$29,432.85

Deducting Hermann's selling expense of 50% (\$14,686.43) of \$29,372.85 reaches a final result of \$14,746.43 as the maximum possible OPA profits loss suffered by Park, Benzinger & Co.

The result should be substantially the same even in the absence of an OPA ceiling of 25% markup. Under the

principle of *Hadley v. Baxendale*, an extraordinary or unusually high markup is not allowed in measuring damages, if the high markup was not made known to the Bercuts at the time they contracted, *Guetzkow Bros. Co. v. Andrews*, 92 Wis. 214, 66 N.W. 119, 52 A.L.R. 209, 53 A.S.R. 909, leading case; 8 R.C.L. Damages, Section 66; Mechem on Sales, Sections 1766 and 1767. In *Guetzkow Bros. v. Andrews*, supra, the Court rejected profits on resales under markup "amounting to from 100 to 150 per cent". Such an extraordinary markup was rejected in the absence of notice of it to the seller at the time he contracted, and a judgment against the buyer was affirmed for failure to sustain the burden that was on him, as part of a damage claimant's case, to put the Court "in possession of sufficient evidence to enable it to arrive at a conclusion in respect to what would amount to a reasonable profit on the transaction". (66 N.W. at 122, col. 1.) We quote *Mechem, Sales*, Sections 1766-1767:

"If when the contract of sale is made, the seller knows not only of the fact of the resale, but also of the particular price to be received upon it, there can usually be but little difficulty in holding him responsible upon the basis of that particular price. If, however, though he knows of the fact of the resale, he does not know the price, he could not be held liable upon the basis of the particular price if it were unusual or extravagant. He must, nevertheless, be held to contemplate that the resale is to be at a fair and reasonable profit at least, and, if he knows that the article is not one which has a market price, he may be held liable upon the basis of the contract price, if that is not such as to yield an unreasonable or unfair profit.

Ordinarily, it is said, the price to be received upon the resale 'would presumptively, be held to be a reasonable price; but if the facts in any given case are

such as to show such price to yield an extravagant or extraordinary profit,' the seller will not be bound in absence of knowledge of it; 'and, in order to assess the damages, the court must be put in possession of sufficient evidence to enable it to arrive at a conclusion in respect to what would amount to a reasonable profit on the transaction.' "

The markup under plaintiff's retail list for April, 1943, posted in March, is nearly 100%, and there is not even a scintilla of evidence that the Bercuts knew of it when they contracted. The markup under the *wholesale* list posted in and for May, 1943, under prices f.o.b. San Francisco, figures as follows:

	<u>Cost</u>	<u>Posted Price</u>	<u>Markup</u>
Dry	\$5.25	6.75	28.6%
Sweet	6.00	7.50	25%

The *retail* list must be wholly rejected under the foregoing authorities, and under the principle of *Hadley v. Baxendale*. The wholesale markup under Exhibit 15 approximates the maximum OPA markup.

IV.

THE COURT BELOW ERRED IN MODIFYING DEFENSE REQUEST NO. 35 (SPECIFICATION OF ERROR V), I.E., IN REFUSING TO INSTRUCT THE JURY TO DEDUCT HERMANN'S 50% SELLING COMMISSION FROM ANY AWARD TO PLAINTIFF.

The plaintiff cannot be awarded gross profits; the expenses of doing business must be deducted, *Coates v. Lake View Oil & Refining Co.*, 20 Cal. App. (2d) 113, 119, 66 Pac. (2d) 463, 466; *Terre Haute Brewing Co. v. Dwyer*, 8 Cir., 116 Fed. (2d) 239, 242, col. 2.

The jury was instructed (R. 515) that if Hermann was a joint adventurer with appellee, his act in signing the

release of April 27, 1943 (Exhibit 11, R. 178) bound appellee, and their verdict would therefore be for appellants. Accordingly, there is implicit in the verdict a finding that Hermann was not a joint adventurer but was an employee of appellee. The 50% payable to Hermann was therefore a selling expense and must be deducted.

In *Landon v. Hill*, 136 Cal. App. 560, plaintiff sued for profits lost through the action of defendant landlord in evicting him. Plaintiff had carried on a bakery goods business. In modifying the judgment because of the fact that no allowance had been made by way of salary to the plaintiff himself in determining net profit, the District Court spoke as follows:

“The last point urged by appellant as to the excessive amount of damage is that plaintiff and the court in computing the expenses of operating the bakery from which to determine the net profits realized, did not deduct anything by the way of salary to Landon himself, although he was the baker and carried on the business principally through his own efforts.

It seems apparent that this was error. The value of the labor was independent of the lease and formed no part of the profits of the lease. If appellant had employed a baker his wages would have been deductible as an expense. In other words, the profit to be recovered is the net profit, to ascertain which, all sums expended in producing the crop or conducting the business, including rent and reasonable cost of marketing, are to be considered. (*McCready v. Bullis, supra*; *Rice v. Whitmore*, 74 Cal. 619 (16 Pac. 501, 5 Am. St. Rep. 479).)

Therefore, in order to determine the profits of the business done by plaintiff, the item of labor, whether performed by himself or others, must be taken into consideration.”

Accord:

Columbus Mining Co. v. Ross, 50 A.L.R. 1394, 290 S.W. 1052, 218 Ky. 98, and note at 50 A.L.R. 1397; *Klingman & Secoular v. Racine-Sattley Co.*, 149 Iowa 634, 128 N.W. 1109.

If it be contended that the 50% to Hermann was not wholly for his full-time services as a salesman but was in part for the value of the contract or as a "finding fee" to him, then it would be or partake of the nature of a royalty, and as such would have to be deducted. Royalties are deductible. In *Lacy Mfg. Co. v. Gold Crown Mining Co.*, 52 Cal. App. (2d) 568, 126 Pac. (2d) 644, damages were sought for alleged loss of expected profits from the operation of a quartz mill, arising from delay in performance of a contract for moving the units of the mill from one mine location to another. In rejecting the claim, the Court said (52 Cal. App. (2d) at 574, 126 Pac. (2d) at 647, col. 2):

"But aside from the difficulties encountered by reason of the terms of the contract itself, there is not a sufficient showing of certain and immediate damage suffered; no factual statement of any ore blocked out; not even a statement that the structure below the surface of the earth was gold-producing or that any amount of ore could be mined and reduced within a specified time; no statement of the cost of mining and milling or of royalties to be paid. In short there is nothing to indicate the profits available to defendant during the 72 days in question. In the absence of these and allegations of the costs of labor, of the depreciation of the milling plant, of the cost of power and water; of royalties to be paid; of the amount of ore that could be mined and milled during the period in question, there was nothing in the cross-complaint to aid the court in trying the question of profits lost. Recoverable damages for any breach are only those which were reasonably in the contemplation of the

parties at the time of entering into the agreement. *Johnson v. Levy*, 3 Cal. App. 591, 86 P. 810; *California Press Mfg. Co. v. Stafford Packing Co.*, 192 Cal. 479, 221 P. 345, 32 A.L.R. 114."

Prospective profits must be "diminished by charges composing an essential element" in the cost of producing the net residue finally remaining to the plaintiff, *Oakland California Towel Co. v. Sivils*, 52 Cal. App. (2d) 517, 520, 126 Pac. (2d) 651, 652, col. 2. The use of the terms "fixed costs", "overhead", "direct overhead", "indirect overhead", "indirect miscellaneous overhead", "profits", "loss", "detriment", "benefit", etc. (52 Cal. App. (2d) at 520, 126 Pac. (2d) at 652) is of no consequence; the "only matter of concern" (id.) is, what did the plaintiff lose as a result of the breach? The plaintiff at bar lost no more than the maximum it could have had left in its hands after paying Hermann his 50% commission or royalty or both, i.e., the plaintiff's "benefit lost" (id.) is no more than \$14,746.43. Hermann is not a party to the complaint at bar and what he may have lost is not in issue, nor is there any basis in the law for swelling appellee's lost profits by including Hermann's.

V.

THE COURT BELOW ERRED IN REFUSING TO GIVE THE INSTRUCTION IN DEFENSE REQUEST NO. 37.

The requested instruction and the exception to the refusal to give are set out in Specification of Error IV. The request reads, R. 63:

"I further instruct you that you must consider the fact that because no wine was delivered under the contract to the plaintiff it follows that the plaintiff was relieved from business hazard and responsibility

in the handling and disposing of the wine over a period of years, and was freed from any risks involved, and from time and trouble. From the award, if you make any, to the plaintiff, you should make a reasonable deduction from any arithmetical or calculated amount of net profits, because of that release and freedom from risk, hazard and responsibility, and saving from expenditure of time, trouble and energy over the period of time originally contemplated for completion of delivery in monthly installments. The amount of such deduction is not fixed in any particular percentage by law which leaves it to the good sense and wisdom of an intelligent jury.”

The request is framed upon the ruling in the leading case of *Floyd and Speed v. United States*, 2 Ct. Cl. 429, 441, affirmed in *United States v. Speed*, 8 Wall. (75 U.S.) 77, last two paragraphs. Therein, Speed had during the Civil War contracted with the United States to slaughter and pack for the government 50,000 hogs, at a fixed price per hog, the hogs to be furnished by the government. After furnishing 17,132 hogs the government failed to furnish any more and the suit was in the Court of Claims to recover damages for the failure to furnish the remainder of 32,868 hogs. Speed had sublet his contract reserving “from 70 to 75 cents per hog” (2 Ct. Cl. at 441) and claimed as his damages at that rate. The Court of Claims ruled (2 Ct. Cl. at 441):

“From the amount reserved on the sub-letting is to be deducted a reasonable sum, on account of the relief of the contractor from responsibility for a large part of the contract, and for the time and trouble which a full performance would have required and imposed upon him. The balance will show the clear net profits that would have accrued on the unperformed part of the contract, and the damages to which the claimants are entitled. As they were relieved, by the relinquish-

ment of two-thirds of the contract by the United States, of all the responsibility and risks involved in so much of it, as well as from devoting their time and attention to it to that extent, there ought to be a reasonable deduction on those accounts. Applying these rules and principles to the cases in hand, we think that, making all reasonable deductions, the sum of sixty (60) cents per hog would represent the true net profits to the contractors."

On an appeal by it to the Supreme Court, the government contended *inter alia* that "the rule for the measure of damages is not the correct rule as applied to the facts", as to which the Supreme Court said:

"What would be the true rule is not pointed out. And we do not believe that any safer rule, or one nearer to that supported by the general current of authorities, can be found than that adopted by the court, to-wit: the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract.

The leading case on this subject in this country is *Masterton v. Brooklyn*, 7 Hill, 62, and that fully supports the proposition of the Court of Claims."

Our requested instruction should have been given. By electing to sue immediately upon the claim of repudiation, the appellee relieved itself from any responsibility attending an execution of the contract by it and was entirely relieved from business hazard, risk and responsibility. It was benefited to a far greater extent than Speed was in his case, because the latter had a fixed rate of payment and profit per hog whereas appellee was at the hazard of the market for obtaining from its sales an excess over the

cost to it under the contract. The wholesale and retail selling prices posted by appellee in New York in the early part of 1943 were posted at a time when the Germans were in occupation of the wine-producing countries of France and Italy and those posted prices were obviously subject to collapse according to the course of the war. There was a wine scarcity, with abnormal prices. The business hazard connected with wine prices would be great and would extend over the greater part of two years in the course of delivery of the 26,691 cases, a carload a month, which would not have been completed until around the end of the year 1945. The case at bar is preeminently one for the application of the rule of damages laid down in *Speed's* case and the Court below erred in failing to give the rule of that case to the jury for their consideration.

VI.

THE COURT BELOW ERRED IN GIVING THE PLAINTIFF'S REQUEST NO. 10, SPECIFICATION OF ERROR VIII.

Appellee, as plaintiff below, in its Request No. 10 for an instruction, which was given by the Court, cited in support thereof "3 Williston Rev. Ed. p. 2475". The instruction given is without support in the law. It is not supported by the citation to Williston appended by plaintiff to its Request No. 10, which goes no further than to show that a "doubt" of solvency is insufficient to show insolvency. The passage occurs in § 880 of *Williston, Contracts*, under the section heading, "Insolvency or bankruptcy". However, the very next section, § 881, "Inability to perform unless the other party performs", shows a wholly different and independent head of inability, not dependent on solvency or insolvency; and it is the § 881

head that shows the error in instructing the jury that proof of actual insolvency is essential to a showing of inability.

The purchase of 26,691 cases at the contract prices amounted to an aggregate of \$130,000 and \$140,000. The purchase of 60,000 cases amounted to about \$330,000. A single carload of 1500 cases amounted to about \$8000. In the case of a falling market, we could never have collected any damages from them. Their net worth would not have enable them to pay more than some trivial amount less than \$1000. Obviously, they would depend upon the wine to finance itself. Obviously, with a net worth of no more than \$1000, even a single carload at \$8000 would have to be self-financing. Ability to perform cannot be predicated upon the credit obtainable through receipt of the wine or the shipping documents covering it, *Brown v. Lee*, 5 Cir., 192 Fed 817; *Williston, Contracts*, § 881.

It appears without dispute from the evidence that appellee is what is commonly known as a "dummy" corporation. It is and was a wholly owned subsidiary of another corporation, R. 336, and it never at any time had a capital greater than the sum of \$1000, R. 336. Any profits made by it were immediately paid out in dividends (R. 338) and its current liabilities at all times equaled its current assets, R. 338. The purpose of the formation of this "dummy", as stated by Elman, one of its officers, was to limit the liabilities of the officers of the mother holding company. In the face of this evidence, the Court instructed the jury that the inability of plaintiff to perform the contract was a matter of defense and not part of the appellee's case; that the burden of proving such a defense was on appellants and that they were required to prove that the appellee was actually insolvent,

R. 518. Coupling this instruction with the failure of the Court to instruct at all on the burden of proof, it is easy to see why the jury obviously took the view that the burden of disproving the appellee's case rested upon appellants.

A plaintiff who is not ready, *able* and willing to perform a contract on the due day cannot recover for an anticipatory breach of the contract by the other party, *Western Grocer Co. v. New York Oversea Co.*, 28 F. (2d) 518, 520, and if the plaintiff is financially unable to perform, he cannot be said to have been damaged in the case of a breach by the other party to the contract, *Gray v. Smith*, 9 Cir., 83 Fed. 824; *Petersen v. Wellsville City*, 8 Cir., 14 F. (2d) 38.

VII.

THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

A motion for a directed verdict in favor of appellants was made at the close of all the evidence on March 20, 1944, R. 465, and denied on that day, R. 470. The verdict was returned on March 22, R. 66. Within less than ten days after the reception of the verdict, i.e., on March 27, these appellants moved the Court under Rule 50(b), FRCP, R. 463-465:

"To order the verdict of March 22, 1944, and any judgment thereon, set aside and to enter judgment in accordance with the motion for a directed verdict made by these defendants at the close of all the evidence, upon each and all of the grounds specifically stated in support of such motion for a directed verdict when it was made."

The motion was denied, R. 541.

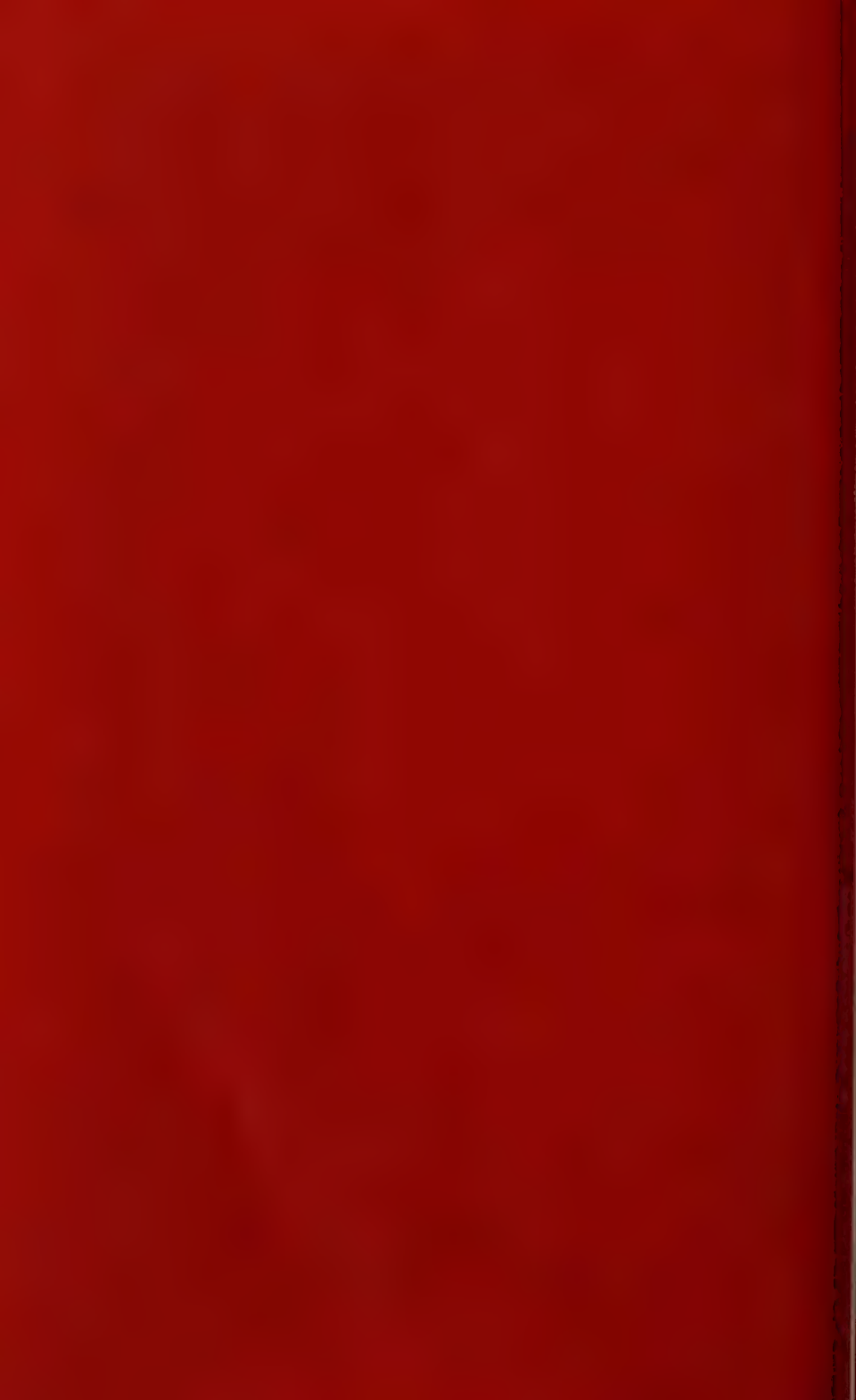
Therefore, under Rule 50(b), if the Court should conclude that any one of our grounds of motion for a directed verdict is good, then the reversal should not be a general one but should be accompanied by a direction to enter judgment in our favor notwithstanding the verdict.

Dated, San Francisco,
November 29, 1944.

Respectfully submitted,

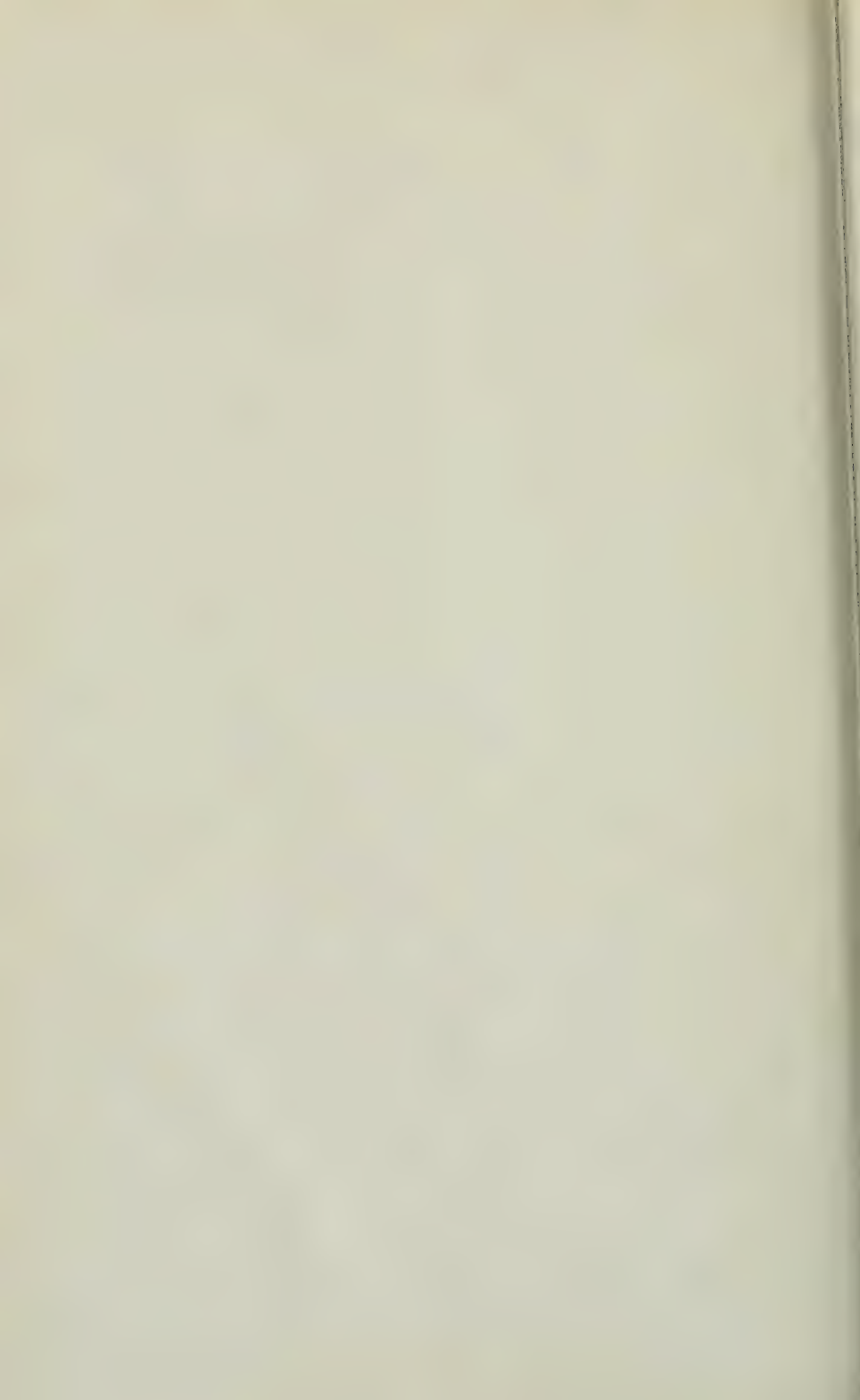
GEORGE M. NAUS,
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Pierre Bercut and Jean Bercut.

(Appendices A, B and C Follow.)



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Appendix A

AGREEMENT

This AGREEMENT entered into this 29th day of January, 1943, by and between Pierre Bercut and Jean Bercut, doing business as a co-partnership, under the firm name and style of P & J CELLARS, License No. 14-P-175, at 743 Market Street in the City and County of San Francisco, State of California, hereinafter referred to as party of the first part, and CHATEAU MONTELENA of New York, License No. WW9, with offices at 48 West 48th Street in the City and State of New York, herein represented by Serge Hermann, its duly authorized special representative, residing at No. 321 West 55th Street, Borough of Manhattan, City and State of New York, party of the second part.

WITNESSETH:

WHEREAS the party of the first part is the owner of certain stocks of wines of various kinds and vintage and WHEREAS the party of the second part is desirous of purchasing said wines on an installment basis over a period of years.

Now, THEREFORE, in consideration of the mutual promises and covenants herein contained, and in consideration of the sum of One Dollar (\$1.00) each to the other in hand paid, receipt of which is hereby acknowledged, it is mutually agreed as follows:

FIRST: The party of the second part hereby agrees to purchase approximately 60,000 cases of assorted bottled in California wines, part of which is at present bottled

and stored, and the balanced to be bottled under terms and conditions to be mutually agreed upon.

SECOND: The party of the second part hereby agrees to take delivery of said wine at the rate of one carload each and every consecutive month hereafter for the next three years, the first carload to be taken during the month of February, 1943, and continue thereafter as stated up to the year 1945, with the understanding, however, that should the party of the second part desire additional quantities for the holidays a maximum of two cars may be shipped in a particular month, provided ample notice of such intention is given to the party of the first part.

THIRD: The quantities now bottled and stored may be stated approximately as follows:

Burgundy ...	7,167 cases of 12 bottles of fifths per case
Claret	7,145 cases of 12 bottles of fifths per case
Rhine Wine	6,587 cases of 12 bottles of fifths per case
Sauterne	4,095 cases of 12 bottles of fifths per case
Sherry	834 cases of 12 bottles of fifths per case
Port	863 cases of 12 bottles of fifths per case

and the price for this block of merchandise herewith mutually agreed upon to be paid to first party by second party shall be as hereby stated and subject to the terms and conditions herein stipulated. During the year 1943 dry wines will be billed on the basis of Five Dollars and twenty-five cents (\$5.25) per case and the sweet wines at Six Dollars (\$6.00) per case. Prices F.O.B. San Francisco, California. During the year 1944 payment shall be made on the basis of Five Dollars and fifty cents (\$5.50) per case for dry wines and Six Dollars and twenty-five cents (\$6.25) per case for sweet wines F.O.B. San Francisco, California.

It is agreed that shipment of the above mentioned quantities will be made first and before any other commitments, and that the balance of the amount of the sale, which has not been bottled, is to be paid for proportionately as between dry wines and sweet wines the same, but subject to negotiations between the parties hereto whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945.

FOURTH: Second party hereby agrees that the assorted quantities bottled and stored have been sampled by him and are herewith accepted in entirety, and the party of the first part assumes no further liability as to the quality of the wines, but on quantities not yet bottled it is agreed that prior to acceptance, samples will be forwarded to the party of the second part for its approval, and in the event of non-approval nothing herein contained shall prevent party of the first part from disposing of such stocks through other channels should it so desire.

FIFTH: That the manner of payment shall be by sight draft with bill of lading attached F.O.B. San Francisco, California, drawn on second party for each shipment by car or steamer as the case may be.

SIXTH: The party of the first part herewith stipulates that all taxes of any description levied upon said wines have been paid as of this date and second party herewith agrees to assume the payment of any and all taxes that may be levied upon said wines subsequent to the date

hereof, by the Federal, State, Municipal or any other constituted authority.

SEVENTH: The party of the first part shall assume all storage charges on the stocks remaining unshipped in San Francisco, and will carry sufficient insurance to protect the interests of both parties hereto, but in the event of destruction or damage to the stock due to fire, earthquake, acts of God, acts of war, the public enemy or any other causes beyond the control of party of the first part it is clearly understood that the terms hereof shall be inoperative.

EIGHTH: The party of the second part shall supply at his own expense labels of his own choice to be affixed to the bottles, and shall also supply a special strip to be attached to each bottle of suitable design and appearance approved by party of the first part with the inscription placed thereon "SELECTED BY BERCUT FRERES", and the party of the second part without allotment herewith agrees to conform to all the existing rules and regulations pertaining to labels and to any future legal aspects that may be formulated holding the party of first part harmless from any and all controversies that may arise.

NINTH: The party of the first part hereby agrees to supply suitable cases for shipment out of San Francisco, said cartons to be in conformity with recognized practice in the shipment of wines to New York, but in the event of inability to secure standard cartons due to war conditions or priorities reserves the right of substitution to other cartons mutually considered to be of sufficient tensile strength for shipment to New York under normal conditions of handling by the carriers. The party of the first

part hereby agrees to furnish the labor for casing and affixing the labels and to deliver on cars or docks as desired in San Francisco.

TENTH: The party of the first part hereby grants unto second party the right to establish its own resale prices in all states, territories or for export.

ELEVENTH: The parties hereto mutually agree that the terms and conditions of this agreement shall be binding upon the heirs, executors, beneficiaries or successors in interests of both parties, and that in the event of any disagreement or conflict of interpretation respecting any of the provisions hereof it is specifically agreed that the laws of the State of California shall govern and that should it be necessary to adjudicate any of the provisions herein such adjudication shall be submitted to a Court of competent jurisdiction in San Francisco, California.

IN WITNESS WHEREOF the parties hereto have set their hands this 29th day of January, 1943.

P & J CELLARS,

By PETER BERCUT,

First Party.

CHATEAU MONTELENA OF NEW YORK,

By SERGE HERMANN,

Second Party.

Appendix B

San Francisco, California,
February 3, 1943.

Chateau Montelena of New York,
48 West 48th Street,
New York City, N. Y.

Attention: Mr. Serge Hermann

Gentlemen:

With reference to our agreement executed on the 29th day of January, 1943, the following revisions or additions are herewith made, said additional data to be included and to form part and parcel of the original agreement:

1. That the quantities stipulated as bottled as of this date are to the best of our knowledge vintage wines of 1937 and 1938.

2. That shipments of first car are to be made at such time as approval of labels can be secured and both parties are in a position to effect shipments, but the greatest diligence should be exercised by both parties in order to commence at least 60 days hence.

3. That the wines purchased have been produced and bottled by the California Wine Association and that an inscription bearing these words can be placed upon the labels.

All other terms and conditions are to remain without change and in full force and effect.

Very truly yours,

P & J CELLARS,

By PETER BERCUT.

WGE:HF

Appendix C

[Plaintiff's Exhibit 3, in at R. 86; letter from Hermann at New York, February 15, 1943, addressed to Pierre Bercut, c/o Bercut Brothers.]

Dear Pierre:

I just returned home last Saturday afternoon. For the last couple of hours we have done nothing else, Mr. Benziger, Mr. Elman and myself, but to talk over the arrangements that I made with you, and I am glad to advise you that they are quite pleased, and I have no doubt that we will develop relations which will prove mutually profitable and agreeable.

The first thing we are now doing is to work on a label. Many suggestions are being made, and of course before we decide upon one, we want to think the matter over very carefully because it is of such extreme importance, and once we have decided what label should be used, it will have to be a good label. At any rate, we will send our final choice to you, so that you may have a chance to give us also your reaction to same.

From now on I suggest to you that all correspondence and everything pertaining to our relations be written direct to Park, Benziger & Co., Inc., 24 State St., New York, N. Y., so that it may be given proper attention.

As explained to you in San Francisco, it is my intention, as soon as a label is finished, to come over to San Francisco so as to supervise the first shipment, and I sincerely trust that either Mr. Benziger or Mr. Elman may find it possible to join me in order to meet you and lay the foundation of our future relations.

With reference to the Chianti which you were kind enough to offer me, we are enclosing herewith orders,

which are self-explanatory. Would you be kind enough to send us a case of this Chianti in pints, billing us with same.

With regards to the label, you will recall that when we were down to see Verdier you showed me a label with a picture of the Napa Valley, which was indeed very beautiful. You suggested then that you would secure the cut for me. We have an idea that this picture of the Napa Valley would look very pretty in conjunction with the label that we have in mind. Will you please, therefore, send us the cuts of the Verdier label.

If you have already taken the pictures which you contemplated taking of the warehouse with the bottles racked, I would appreciate your sending them to us. If what you have taken is in the form of films, as you intended, we can make the enlargements here ourselves. Everything, of course, in the line of advertising will help.

I have told Park, Benziger & Co. that you would be kind enough to co-operate with them by making a few placements in some of the high spots of San Francisco on our new wine labels. They appreciate your thoughtfulness in this matter, and we will at some future date be able to use this type of placement for promotion material here in the East.

I take this opportunity in behalf of Mr. Benziger, Mr. Elman and myself of thanking you for the many courtesies shown me when I was in San Francisco and can assure you of our future co-operation with the hope that it will benefit all concerned.

With kindest personal regards to Jean, Henri and yourself,

Sincerely yours,

SERGE.

No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individually and as Copartners doing business as P & J CELLARS (a Copartnership),

Appellants,

vs.

PARK, BENZIGER & Co., INC. (a Corporation),

Appellee,

and

PARK, BENZIGER & Co., INC. (a Corporation),

Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J CELLARS (a Copartnership),

Cross-Appellees.

BRIEF FOR APPELLEE.

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IN THE

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For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individ-
ually and as Copartners doing business as
P & J CELLARS (a Copartnership),
Appellants,

vs.

PARK, BENZIGER & Co., INC. (a Corpora-
tion),
Appellee,

and

PARK, BENZIGER & Co., INC. (a Corpora-
tion),
Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individ-
ually, and as Copartners doing business
as P & J CELLARS (a Copartnership),
Cross-Appellees.

BRIEF FOR APPELLEE.

We have already stated the most essential facts of this case in the opening brief on our cross-appeal. The defendants (Bercut Bros.) agreed to sell 60,000 cases of wine to plaintiff (Park, Benziger & Co., Inc.) under a written contract. On April 27, 1943, defendants committed an anticipatory breach by announcing

to plaintiff that they would not sell or deliver to them any wine under the contract. Defendants subsequently sold the wine to other customers at a higher price. See R. 398 (Jean Bercut) :

“Q. Didn’t you sell Mr. Harry Rathjen, who testified here yesterday, some of the wines, some wines covered by the contract here in issue, at a price in excess of the contract price?

A. Yes, at a later date, much later date; in May or sometime.”

The jury on the second trial returned a verdict for \$72,687.50. Appellant does not question the sufficiency of the evidence to show an anticipatory breach. After quoting the evidence (Appellants’ Op. Br. p. 23) counsel say that Elman (plaintiff’s Vice-President, R. 69) “treated” the facts as “a repudiation i.e., as an anticipatory breach”, and make no attempt to deny that Elman was entirely justified in so doing.

The appellants nowhere touch the issue of liability. Their arguments go entirely to questions of damages and to collateral matters. Throughout the statement of the case (Appellants’ Op. Br. pp. 2-31) however, there is an effort to color the facts in appellants’ favor—in spite of the rule that an appellate court must take the evidence favorably to the appellee. In some instances this goes so far as to change the picture given by the evidence, so that if the record is history, the brief is historical fiction.

For the most part we do not attempt to recite all the facts in detail at this time. Relevant facts will be given with the arguments to which they apply. Appel-

lants' more irresponsible misstatements are gathered into Appendix "A" together with quotations showing what the record really says.

We call attention to one matter here, however. Counsel try to give the impression that their clients are inexperienced innocents, wandering like babes in the woods of business (Appellants' Op. Br. pp. 7 (quotation) 8, 9, 10.) This picture is belied by their testimony:

Jean Bercut (R. 379-80):

"Q. How long have you been in business, Mr. Bercut?

A. Thirty years.

Q. How many enterprises have you been connected with?

A. Many.

Q. How many?

A. Well I would say the meat business, the hide business, the wine business, the real estate business."

W. G. Evans (R. 399-400) (called by defs.):

"Q. The Merchants Ice and Cold Storage Company is simply one of many activities, is it not?

A. Of the Bercut Brothers, yes.

* * * * *

Q. What other activities, major activities have you been connected with in Bercut Brothers as an associate or as an employee?

A. I have attended to the financial matters in most of the enterprises.

Q. The Grant Market on Market Street?

A. Yes, sir.

Q. What else, state specifically.

A. Bercut-Richards Packing Company, Sacramento,—English Estate Company,—Markets Investment Company,—Bercut Bros.—P & J Cellars,—Chateau Apartments,—Celeste Apartments,—Tiffany Apartments,—2166 Market Street,—properties in Richmond,—The Arco Apartments,—20th Avenue Apartments.”

In general, a reading of the evasive and self-contradictory testimony of the defendants, particularly the cross-examination of Jean Bercut (R. 356-98) furnishes ample reasons why the jury resolved questions of fact in favor of the plaintiff.

We now answer defendant-appellants’ individual arguments:

I. LOST PROFITS RECOVERABLE REGARDLESS OF DEFENDANTS’ KNOWLEDGE OF LACK OF AVAILABILITY; DIRECTED VERDICT PROPERLY DENIED (Appellants’ Br. pp. 39-54, 70).

In their statement of the case, defendants repeatedly emphasize that when the contract was executed Hermann did not tell defendants that there was no other source of supply if defendants should breach their contract. Hermann undoubtedly expected the contract to be performed, and so did not discuss his position in the event of a breach by defendants. But the question of “notice” which counsel argue at such length (Appellants’ Op. Br. pp. 39-54) is a completely false quantity. Upon the record, the court correctly applied loss of profits as plaintiffs’ measure of damages.¹

¹This measure of damages was correct, regardless of alternative measures which might also have been applied, as set forth in our Cross-Appellants’ Opening Brief.

A. GOVERNING AUTHORITIES.

1. Counsel spend 15 pages of their brief (pp. 39-54) confusing two rules of law, but do not discuss the authorities on which the trial court sustained plaintiff's position.

This 15 page discussion deals with the rule of *Hadley v. Baxendale* and with uniformity of decision—neither of which is an issue. The case was submitted to the jury in accordance with defendants' contention that there was no available market for the type of wine which defendants failed to deliver. The question then arises—what is the measure of *general damages* under such circumstances?

Section 1787 of the Civil Code states the rules of damages under the Uniform Sales Act as follows:

“(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the sellers' breach of contract.

(3) Where there is an available market for the goods in question the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.”

Subsections (2) and (3) deal with measures of damages. Subsection (3) fixes damages where there is an available market. Subsection (2) applies to *other* cases. Therefore Subsection (2) governs the present case, where there is *no* available market.

Subsection (3) *which does not apply here* contains two provisions. In first line it says that where there is an available market the damages shall be the difference between the contract price and the market price. It makes a secondary provision that *higher damages* may be recovered where special circumstances show proximate damages of a greater amount. Such damages are known as "special damages". As will be shown below, the courts have likewise recognized the principle of special damages in cases falling under Subsection (2).

The point to be kept in mind is that special damages are damages *in excess of general* damages. They may be awarded *where special circumstances show that damages beyond general damages* have proximately resulted.

One form of special damages is loss of profits upon a *specific resale* contract which the buyer may have made or may be about to make. Such damages may be recovered though they are greater than general damages, provided the other party to the contract is put on notice of the special conditions.

We shall show *infra*, that all of defendants' citations fall into this category. But, our problem is different. It is to fix *general damages* when the goods in

question cannot be obtained on the market. The rule here is that *general damages* are the profits which the buyer would have made *in the general course of his business* (rather than upon any particular contract of resale).

Absence of an available market is the general situation contemplated by Subsection (2) of Section 1787 of the Civil Code and need not be specially brought to the seller's attention. Furthermore, since the damages sought are by definition general damages, they do not depend upon the seller's knowledge. This has been held without detailed discussion by California cases both before and since the Sales Act. The New York Court of Appeals in *Orester v. Dayton Rubber Mfg. Co.*, 228 N.Y. 134, 126 N. E. 510 after full discussion adopted this same rule as the proper application of the Sales Act. Other jurisdictions are to the same effect.

The earliest *California case* is *McKay v. Riley*, 65 Cal. 623, which says that where the goods cannot be gotten in the open market the buyer's measure of damages is his loss of profit. No reference is made to notice.

The latest California decision seems to be *Coates v. Lake View Oil Co.* (1937), 20 Cal. App. (2d) 113; cited at page 57 of defendants' brief, and previously cited on their 26th request for instruction (R. 54.) This case states exactly the same rule as *McKay v. Riley*:

(p. 48) "Assuming that there was no established market value of the motor fuel, the proper measure of damage, on this phase of the case,

would have been the loss of profits, if any, suffered by plaintiff by reason of the breach of contract by defendant in its failing to furnish him with approximately 1,217,250 gallons of motor fuel for which no substitute was available and none was purchased''.

We cited *Orester v. Dayton Rubber Mfg. Co.*, 228 N. Y. 134, 126 N. E. 510, in the District Court. It is most closely in point and gives the best discussion of the law, *yet defendants have not so much as mentioned it in their present brief.*

The New York Court of Appeals says in so many words, that where there is no general market, and no special circumstances known to the parties, the buyer's measure of damages for non-delivery is the ordinary profit which he would have made in his business, had the seller performed. (See p. 511):

"Such is the case before us. The plaintiff could not purchase the tires from others in Syracuse." (p. 512) "As there must be a new trial we should determine the proper rule of damages * * * Finally, if none of these tests [purchase on open market, purchase of substitutes] are practicable, another must be adopted. *We are not dealing here with circumstances known to both parties at the time the contract was executed, which made it of peculiar value to the plaintiff. We are not concerned with collateral engagements or consequential damages.* We seek some formula under which the jury may determine the natural, the usual, value of such a contract to any one, under ordinary conditions * * * Here the tires were purchased to be resold at a profit. This profit, if

reasonably certain may be said to measure the value of the contract to the plaintiff. It was this that he lost by the default of the defendant. Not the gross profit, however, which is what the jury was permitted to allow. What the plaintiff might have made had the contract been carried out was this gross profit less the expenses of the business properly chargeable to the sale of the Dayton tire * * *

We decide nothing as to special damages which must be alleged in the complaint. That question is not now before us. We hold only that upon the facts presented, in determining the natural and proximate damages suffered by the plaintiff for the breach of this contract, if the other tests fail, he may prove the ordinary and usual net profits resulting from business conducted in the ordinary and usual way, which he had lost by reason of such breach." (Emphasis added.)

Followed in *Hedeman v. Fairbanks, Morse & Co.*, 36 N. E. (2d) 129, 133 (N. Y.).

See also, to the same effect as the California cases:
Talcott v. Freedman, 149 Mich. 577, 113 N. W. 13.

Defendants spend much space arguing in favor of uniformity of decision under the Sales Act. We fully agree, since that strengthens the application of *Orester v. Dayton Rubber Mfg. Co.*, supra. Where goods are not available on the market, the measure of general damages is loss of profits which would have resulted in the ordinary course of plaintiff's business. Since the damages are general, they are not dependent on notice to the seller.

B. DEFENDANTS' AUTHORITIES NOT IN POINT.

From first to last, defendants' authorities deal solely with *special damages*. *Hadley v. Baxendale*, 9 Exch. 341 itself states the rule as to when the plaintiff may recover special damages beyond the ordinary measure. Furthermore, this was a suit for damages for negligent delay in performance and not a suit for non-performance.

In *Marcus & Co. v. K. L. G. Baking Co.*, 3 Atl. (2d) 627 (Appellants' Op. Br. pp. 40-42), the plaintiff based its entire case upon loss of profits from a *particular contract* of resale. The boldface quotation on page 41 of the defendants' brief refers to the damage as "special damages".

The quotation from *Mitchell v. Clark*, 71 Cal. 163 (Br. pp. 46-7), likewise deals with (p. 169) "Evidence on the part of plaintiff of damages beyond such as the plaintiff would ordinarily be entitled to recover for a breach of contract." (Defendants do not quote this sentence.) The same is true of *Hunt Bros. v. San Lorenzo Water Co.*, 150 Cal. 51, and *Overstreet v. Merritt*, 186 Cal. 494, cited in the brief on pages 46 and 47. The passage from Williston on page 47 is misquoted, a matter to which we shall return later. Defendants made the same misquotation in the District Court and were apprised of it, but have repeated it here (see *infra* p. 12).

In *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, the goods *were available* in the open market, and the case deals with the right to special damages in such a situation.

Czarinkow-Rionda Co. v. Fed. Sugar Ref. Co., 255 N. Y. 33, 173 N. E. 913, 88 A. L. R. 1426, likewise involved special damages only (recovery of amounts which plaintiff had to pay to specific customers when it became unable to perform its agreements with them).

In other words, defendants' authorities do not touch the issue of this case.

It is obvious that if defendants' arguments were accepted they would lead to fantastic results. They claim that absence of an available market must be brought home to the seller, or else the buyer cannot recover 'damages which accrue under such circumstances. (Damages where there *is* an available market would be excluded as inapplicable.) This would mean that in the ordinary case where the parties do not discuss surrounding circumstances, if the seller fails to deliver replaceable goods, he is liable in damages, but if he fails to deliver irreplaceable goods, he gets off scot free. This is absurd.

C. SUMMARY.

The rule of general damages for failure to deliver goods unobtainable on the open market under the Uniform Sales Act is stated in *Orester v. Dayton Rubber Mfg. Co.*, 228 N. Y. 134, 126 N. E. 510. Under that rule the buyer can recover lost profits as general damages regardless of whether the seller knows the goods to be unobtainable on the market. Defendants' arguments about notice of unavailability are taken from the rules of special damages. No evidence of

special damages was offered by the plaintiff. Under the authorities plaintiff made a valid case for general damages.

II. RECORD SUPPORTS FINDING DEFENDANTS HAD REASON TO KNOW WINE UNAVAILABLE.

Apart from the point that defendants' knowledge of plaintiff's profits is immaterial the record supports the inference that defendants knew or had reason to know the condition of the wine market. In this connection counsel's misquotation of Williston is significant (Defendants' Br. p. 47, referred to above).

Defendants have miscopied Section 1347 of Williston on Contracts to read "when a defendant *has been notified* * * * that unusual damages will follow * * * The defendant may have had *notice* of a sub-contract * * *". The italicized words are not in the text. Williston's language is:

"When a defendant has *reason to know* * * * that unusual damages will follow * * * The defendant may have had *reason to know* of a sub-contract."

"Reason to know" is clearly broader than the phrases used by defendants. The record in the present case contains plenty of evidence that the defendants had reason to know of the condition of the wine market. In fact, the only way in which they could remain ignorant would be to shut their eyes to it. Both defendants were shrewd and experienced business men with large business interests (see testimony as to their

business experience, pp. 3-4 supra). They knew how to make themselves acquainted with business conditions. The least inquiry would have revealed the state of the wine market. In fact the court says that the rising liquor market was a matter of common knowledge (R. 237) and it is significant that the defendants themselves anticipated rise in prices, saying the wine would soon be worth \$8, \$9 or \$10 a case (R. 122, 180). Under these circumstances defendants' professions of blissful ignorance need not be taken at face value. Rather they point to the opposite conclusion. Compare *Spore v. Washington*, 96 Cal. App. 345, where the court said (p. 355):

“From the facts adduced the jury might easily have concluded that the slightest inspection would have disclosed the conditions actually existing.
* * * In *Wile v. Los Angeles Co.*, 2 Cal. App. 190, it is aptly said, ‘the fact that the manager did not know who placed these boards there might have led the jury to infer that he did not want to know.’ While the facts in that case need not be detailed, the same thought may have been with the jury in this trial.”

In short the record supports the finding that defendants knew or had reason to know of the profits which plaintiff would have been able to make upon the resale of the wine.

III. EVIDENCE OF LOST PROFITS SUFFICIENT

(Appellants' Br. pp. 54-61).

Subdivision III of appellants' opening brief consists of a mélange of miscellaneous points, having no other connection than that they all deal with the general subject of damages.

In this section we shall *answer* the points (a) that there was supposedly an insufficient foundation to give the issue of profits to the jury at all; and (b) that plaintiff supposedly showed gross rather than net profits.

A. SUFFICIENT EVIDENCE TO SUBMIT ISSUE OF ANTICIPATED PROFITS TO JURY.

1. Governing Law.

Defendants contend that on the evidence, prospective profits are not a proper measure of damages. This in turn is based on the claim that there is not enough evidence from which to determine prospective profits. Damages are a matter of substantive law (35 C. J. S. 1296-7) as is the sufficiency of evidence (*Chicago M. & St. P. v. Coogan*, 271 U. S. 472, 474, 70 L. Ed. 1041, 1044). So on this issue California law governs (*Six Companies of Cal. v. Joint Highway Dist. No. 3*, 311 U. S. 180, 85 L. Ed. 114, applying California law; *Erie R. R. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188). (The contract was executed in California, and was to be performed there; the wine was sold F. O. B. San Francisco; R. 73, 74, 171; 78, 79.) The question then is, whether the record contains evidence, which, under California law makes loss of profits a correct measure of damages. The latest California Supreme Court case

touching this subject is *Natural Soda Products Co. v. Los Angeles*, 23 Cal. (2d) 193 (cited Appellants' Op. Br. p. 56) where the Supreme Court states the rule as follows:

(p. 199) "The award of damages, for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. * * * If * * * there has been an operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded."

Citing with approval *Hacker etc. Co. v. Chapman V. Mfg. Co.*, 17 Cal. App. (2d) 265, 267:

"It is well established that damages consisting of the loss of anticipated profits need not be established with certainty. It is sufficient that it be shown as a reasonable probability that the profits would have been earned except for the breach of the contract."

These quotations show that California has no hard and fast or mechanical rule for estimating future profits. The plaintiff is not held to proof of profits in past years—in fact, the *Natural Soda Products* opinion (p. 200) holds that the profit and loss statement of years immediately preceding may be entirely inconclusive. *Evidence is legally sufficient* if it is *logically sufficient* to form an estimate of prospective profits.

And the rule denying damages for uncertainty deals with the *fact* of damage rather than its amount. See *Story Parchment Co. v. Patterson P. Paper Co.*, 282

U. S. 555, 75 L. Ed. 544 (cited with approval in *Natural Soda Products v. L. A.*, 23 Cal. (2d) 193, 200):

(p. 562) "It is true that there was uncertainty as to the extent of the damage but there was none as to the fact of damage, and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

This case is relied on in the *Natural Soda Products* opinion, and shows that the same rule holds *under California and under Federal law* (Sherman Anti-Trust Act).

2. Appellants' Citations Bad Law or Not in Point.

Pages 56 and 57 of appellants' brief are spread with a list of cases, none of which is in point.

Gibson v. Hercules Mfg. & Sales Co., 80 Cal. App. 689, and *California Press Mfg. Co. v. Stafford Packing Co.*, 192 Cal. 479, are distinguished in the *Natural Soda Products* opinion, 23 Cal. (2d) 193, 199:

"If no such basis exists, as in cases where the *establishment of a business is prevented*, it may be necessary to deny recovery. (*California P. Mfg. Co. Inc. v. Stafford Packing Co.*, 192 Cal. 479, 485; *Gibson v. Hercules Mfg. Co. Inc.*, 80 Cal. App. 689.) If, however, there has been op-

erating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded.”

Since *Natural Soda Products v. L. A.*, 23 Cal. (2d) 193, is the latest California Supreme Court decision, it must control over defendants’ other citations. *Central Coal & Coke v. Hartman*, 111 Fed. 96, is an Eighth Circuit case which is almost directly contrary to *Story Parchment Co. v. Patterson P. Paper Co.*, *supra*. The *Central Coal* case holds that lost profits must ordinarily be held too speculative and that damages are the exception. This case can no longer be considered the law even within its own jurisdiction (under the Sherman Act). It was cited by the losing side in *Story Parchment Co. v. Patterson P. Paper Co.* (75 L. Ed. 544, 546, col. 1, ft.; see also the Circuit Court opinion 37 Fed. (2d) 537, 539, ft.). The Supreme Court of California has followed the *Story Parchment* decision.

Iron City Toolworks v. Welisch, 128 Fed. 693 (C. C. A. 3), is another case which speaks of damages for lost profits as the “exception” and denial of such damages as the “rule” (128 Fed. 693, 696). It is inconsistent with the law as ultimately laid down both by the Supreme Court of the United States and the Supreme Court of California.

Terre Haute Brewing Co. v. Dwyer (1940), 116 Fed. (2d) 239, is an Eighth Circuit case, decided subsequent to *Erie R. R. v. Tompkins* (1937). It applies the law of the *State of Missouri* (116 Fed. (2d) 239,

242), and is therefore not relevant in a case depending upon the law of *California*.

Thrift Wholesale Inc. v. Malkmillion Corp. (1943), 50 F. Supp. 998, applies the *law of New Jersey* (50 F. Supp. 998, 1000) even commenting upon its strictness in refusing to grant damages (50 F. Supp. 998, 1000, col. 1, top). The holding is obviously inapplicable to a case involving California law. The same is true of *Salaban v. East St. Louis Co.*, 1 N. E. (2d) 731 (Ill. App.), which applies the law of Illinois.

Appellants also cite three California Appellate cases, *Coates v. Lake View Oil & Ref. Co.*, 20 Cal. App. (2d) 113, *Stephany v. Hunt Bros.*, 62 Cal. App. 638, and *Austin v. Roberts*, 130 Cal. App. 328. All are necessarily subordinate to the later Supreme Court decision (*Natural Soda Products v. L. A.*) especially as no petition for hearing was filed in any of them (Cf. *Nichols v. Superior Court*, 1 Cal. (2d) 589, 595, commenting on a District Court of Appeal decision from which no petition for hearing was filed. See also, *People v. Davis*, 147 Cal. 346, 350; *Bohn v. Bohn*, 164 Cal. 532, 537-8; and *People v. Rabe*, 202 Cal. 409, 418-9, all holding that a Supreme Court decision controls over earlier District Court of Appeal cases even where a hearing was asked and denied). But *Coates v. Lake View Oil Co.*, 20 Cal. App. (2d) 113, 118, recognizes lost profits as a general measure and does not attempt to lay down any hard and fast rules of evidence for proving profits. It merely holds that the plaintiff had shown gross, rather than net profits.

Austin v. Roberts, 130 Cal. App. 328, goes off partly on the matter of proximate cause, as between defendant's acts and other matters (130 Cal. App. 332-3). Partly, however, it goes back to the supposed rule that damages for loss of profits are the "exception"—which seems definitely not to be the law, since *Natural Soda Products v. L. A. Stephany v. Hunt Bros. Co.*, 62 Cal. App. 638, likewise presents the opposite approach from that taken in the *Natural Soda Products* and *Story Parchment Co.* cases. Furthermore, the case was an appeal by the plaintiff after findings of fact in favor of the defendant. On such an appeal the evidence must be taken most favorably to the defendant; the only question is whether the evidence can reasonably be construed to support the findings. In the present case, the defendants cannot prevail unless the evidence is *as a matter of law insufficient* to support findings in favor of plaintiff.

We now show that under the law as stated in the *Natural Soda Products* and *Story Parchment* cases, the plaintiff's evidence on lost profits was sufficient to go to the jury.

3. Evidence Sufficient Under Governing Authorities.

The issue is what profits plaintiff would probably have made, if it had obtained the wines covered by the contract.

This depends upon (1) the selling price; (2) the selling expenses; (3) the probability of being able to sell the wine; (4) whether these facts can be established by qualified witnesses.

The witnesses Elman, Cholet, Hermann and Lusinchi testified to facts which fully proved that plaintiff would have been able to sell all the wine under the contract at plaintiff's list prices. Appellants try to avoid the effect of this testimony by cavalierly calling it "worthless" (Appellants' Op. Br. p. 59). No argument or authority is offered to sustain this characterization.

Quotations from the record make it clear that these four witnesses were qualified to testify as they did, and that their testimony covers all phases of the plaintiff's probable profits.

We have already referred to Elman's testimony. It is quoted at length in Appendix "A". He was the plaintiff's vice-president in charge of sales and promotions (R. 69-70). Previous to the invasion of France, the company had done business in imported wines (R. 71); it had dealt in domestic wines to the extent of 10,000 cases (R. 153). The plaintiff has been in business since 1855 (R. 70). An alcohol shortage developed after the United States' entry into the war because alcohol is used in smokeless powder. A whiskey shortage and then a wine shortage followed (R. 71-72). There was a tremendous demand for wine on the dealers who had any in stock (R. 300). Plaintiff could have sold the entire 60,000 cases covered by the contract, either at wholesale or at retail (R. 301, 320). The cost would be about 6% of the selling price plus 35 cents a case transportation and insurance on retail sales (R. 304, 305, 313, 314) and 2% of the selling price on wholesale sales (R. 319). *Cholet* testified to

the same effect; his testimony is quoted in Appendix "B".

Serge Hermann gave a picture of the frantic demand as early as January 1943, about the time the contract was signed:

(R. 188) " * * * When I came over to San Francisco I found that the Palace Hotel was filled with every person interested in the wine industry * * *."

Marcel Lusinchi gave similar testimony, also quoted at length in Appendix "B".

We have already called attention to the evidence that the defendants themselves anticipated a rise in wine prices (R. 122, 180).

All of these witnesses were qualified as experts. (See their testimony in Appendices "A" and "B".) Estimates of lost profits have been upheld upon opinion evidence (*Shoemaker v. Acker*, 116 Cal. 239, 246).

The picture drawn by this evidence is that of an extreme shortage, with a wild demand and rising prices, all uniting to produce a market in which wine practically sold itself. The seller could virtually name his own price. When Elman stated that plaintiff could have sold the entire 60,000 cases at list prices (R. 320) he was merely stating the obvious. The value and reliability of these witnesses were questions for the jury. Their testimony as to market conditions taken together with Elman's testimony as to selling costs, clearly satisfies the rule that damages may be recovered for lost profits where "there is a satisfac-

tory basis for estimating what the probable earnings would have been had there been no [breach of contract]" (*Natural Soda Products v. L. A.*, 23 Cal. (2d) 193, 199).

Appellants contend that plaintiff should have introduced evidence of its past profits on domestic wine sales, and even seem to imply that this was the only admissible evidence (Appellants' Br. p. 55).

The language of the *Natural Soda Products* opinion does not limit the plaintiff to any one particular type of evidence. In the case at bar evidence of past profits would have been logically irrelevant. Defendant's breach took place after the war shortage had set in; the period of performance of the contract would have been under war conditions. The question was as to probable profits during this period of shortage. But plaintiff's past profits were *before the shortage*—obviously under conditions less favorable to the seller than the period covered by the contract. It is a *non sequitur* to try to estimate profits *during a shortage* from business statistics *prior to its onset*. Undoubtedly defendants are calling for such evidence because they believe it would be weaker than the evidence actually produced.

A situation even less favorable to the plaintiff existed in *Natural Soda Products v. L. A.* Plaintiff there had made no profits whatever in the two years immediately preceding the flooding of its plant (23 Cal. (2d) 193, 200). But a change of conditions had promised profits in the future:

(p. 200) "The court might well have concluded that profits were probable, since the completion of alterations enabled plaintiff to sell products from its own plant."

It was held that profits could be estimated from future probabilities rather than from past experience under dissimilar conditions. This holding also justifies the refusal of defense request No. 32 about which counsel complain at page 61 of their brief. The instruction said flatly that anticipated profits cannot be awarded in the absence of a showing of past profits, thus going squarely against this part of the *Natural Soda Products* opinion.

While defendants call for evidence of pre-1940 profits they objected to evidence of *their own sales of the same wine in 1943 and 1944*. This is the evidence discussed in cross-appellant's opening brief pages 25-34. It was excluded by the court, though we submit that it was clearly relevant on the issue of probable profits during the period of the contract. In the present case the testimony as to plaintiff's selling costs, together with the evidence of the condition of the wine market and Elman's positive (and perhaps unnecessary!) statement that plaintiff could have sold the entire 60,000 cases at its list prices, amply support a finding as to loss of profits caused by defendants' breach.

B. PLAINTIFF PROVED NET PROFITS.

At pages 55 and 57-9 of appellants' brief, counsel try to argue that plaintiff proved gross rather than

net profits. This argument is unsound on its face, since plaintiff proved (1) its gross resale price and (2) its expenses in addition to the purchase price from defendants. The difference is, of course, the net profit. Specifically, appellants first try to get rid of Elman's testimony as to cost by calling it "unsupported speculation" (Br. p. 55). Elman, as vice-president in charge of sales and promotion, was qualified to testify as to the selling expenses. Beyond that, the argument that Elman testified from memory rather than from records (Br. p. 54), is a factual argument which could have been made to the jury, but which does not militate against the sufficiency of the evidence on appeal. Counsel's second line of attack is to enumerate specific items of expense which it is claimed the plaintiff did not set forth. As to nearly all of these the answer is that they were items going into the 6% and 2% selling expense to which Elman testified. If defendants had desired the details of these totals, they could have asked for them on cross-examination. For the most part defendants did not do so. As to some of the items, there is the additional answer that plaintiff *did* prove them separately. Still other items were either not regular items of expense or were matters of defense, to be shown by defendants.

Thus on page 55 it is said:

"No attempt was made to prove the cost of washing and polishing the bottles and wrapping them in tissue and no attempt was made to prove the cost of capital to be employed, the value of Elman's services, etc."

(Counsel undoubtedly know exactly what items they refer to by "etc.") As a matter of fact the cost of washing and polishing the bottles was proved separately. Elman (R. 160-61):

"Mr. Naus. Q. Mr. Elman, I understood you to testify earlier today that in the course of some one or more of these discussions you had with one or the other of the Bercuts something was said about cleaning and polishing the bottles and putting tissue paper on them.

A. Yes.

Q. Did I understand you correctly to state as to the matter of the tissue paper and the like that 'We left that open more or less'? What do you mean by that?

A. I said, 'It is only a matter of a few pennies; if you don't do it I will, so what's the difference?'. Then we left it open.

Q. You mean you left it open as to who would pay for it?

A. No. I said I would pay for it if they didn't.

Q. Did you leave it open as to whether it was to be done?

A. Yes. If he didn't want to put them on, it was a matter of a few pennies a case, why I told him I would.

Q. A matter of a few what, per case?

A. A few pennies.

Q. Well, how much would these few pennies amount to, do you know?

A. I don't know off-hand, but *I would think it would amount to around 3 or 4 cents a case for the paper, 12 bottles in a case.*" (Italics added.)

(The original question here refers to washing and polishing and tissue paper. The final answer specifically mentions only tissue paper. On appeal the evidence must be considered favorably to the appellee.)

The cost of printing labels was part of the regular overhead, since Park-Benziger operated under its own label (R. 312-3, referring to the "P & B" brand name). It may reasonably be inferred therefore that this item is included in the 6% overall expense. The same is necessarily true of such routine items as the vice-president's salary, the cost of capital, and presumably minor expenses which counsel have chosen to designate by "etc."

At page 58 appellants say:

"No evidence was offered of the expenses incurred by Elman and Hermann traveling to San Francisco in order to carry out the contract."

Such expenses are necessarily included in the 6% and 2% to which Elman testified. These figures together with testimony as to freight charges, were made with the fact in mind that the wine was in California while plaintiff had its office in New York (see R. 313, and 319, distinguishing wholesale and retail expenses from this standpoint). Defendants could have asked for details if they had wanted them.

At page 58 counsel also reiterate the contentions made on page 55, which we have answered above. On the same page it is said:

"No attempt was made by appellee to offer evidence of the price at which the wine could

have legally been sold under the Emergency Price Control Act * * *."

In the first place, this is a matter of law, not of evidence. In the second place it evidently touches a supposed limitation of the gross profits, not an item of expense. In the third place, it involves a claim of supposed partial illegality, which is a matter of defense to be raised by the defendant (Rule of Civil Procedure 8(c)).

Since plaintiff proved both gross income and expenses, it proved net profits. So the contention that plaintiff claimed gross instead of net profits is simply not supported by the record.

C. SUMMARY.

The record contains sufficient evidence from which to form an estimate of plaintiff's loss of profits. Appellants' attacks upon the witnesses who gave this testimony are factual arguments which would be proper before a jury, but not in an appellate court. Plaintiff proved both its probable gross profits and its expenses, the difference being probable net profits.

IV. PLAINTIFF'S PROFITS NOT LIMITED TO 25% MARKUP.

At pages 55 and 61-69 appellants argue that plaintiff's profit was limited *as a matter of law* to a 25% markup. At page 61 (heading "(e)") they complain that the trial judge refused to instruct that such a limitation existed *as a matter of law*.

At page 70 it is argued independently that the element of notice to the seller enters into the amount which the buyer can recover for loss of profits.

We answer the two arguments separately.

**A. PLAINTIFF NOT LIMITED BY 25% MARKUP; COURT
CORRECTLY REFUSED SO TO INSTRUCT.**

Appellants' argument about a 25% markup limit is based upon the O.P.A. maximum which went into effect as to *wholesalers* in August of 1943. As stated above, appellants contend that plaintiff is subject to a 25% profit limit as a matter of law, and orally requested an instruction to that effect.

There are three answers to these contentions of defendants. *First*, the 25% limit is not applicable to the case at all. *Second*, supposing it were applicable, the record presents a *question of fact* as to whether plaintiff is subject to it. An instruction that it was subject to the limitation *as a matter of law* would have been error. *Third*, the request for instruction was oral and too late, for both of which reasons it was properly rejected.

1. 25% Profit Limitation Not Applicable.

The 25% limit of August, 1943 was inapplicable to the case for two reasons:

(a) Defendants did not plead the defense;

(b) The case was tried upon *defendants' theory* that everything subsequent to April 27, 1943 was *outside the issues*.

a. O.P.A. Limitation Outside of Issues Because Not Pleaded.

Appellants claim that any profit in excess of 25% would be in violation of the O.P.A. price regulations, and that therefore the plaintiff is supposedly limited to a 25% markup. Counsel rightly take the position that this objection is based on supposed *illegality*. See appellants' brief page 61:

"Loss of profits may not be considered as the element of damages where the business from which they would have resulted was, or would have been *conducted in violation of law*." (Italics added.)

Under the Federal Rules of Procedure, *illegality must be affirmatively pleaded by the defendant*. Rule 8(c) provides in part:

"*Affirmative defenses*. In pleading to a preceding pleading a party shall set forth affirmatively * * * *illegality* * * *."

Before the rules there was some confusion as to whether illegality had to be specially pleaded, or whether it could be raised under the general issue. The rules have resolved this doubt. If the defendant does not set up illegality, it is not an issue in the case. Defendants did not set up O.P.A. price limits in their answer. Their fifth defense to the amended complaint is the only one touching illegality. It deals with an entirely different matter. See R. 24:

"Neither plaintiff herein nor Chateau Montelena of New York, or both, ever had or now has the legal right to enter *into or perform the said*

agreement marked Exhibit A, as modified by the letter marked Exhibit B." (Italics added.)

This deals with the legality of *the original contract of purchase*, not with legality of *resale prices*. We are not faced with the question whether or not illegality may be set up in general terms. In this case the fifth defense *specifically refers to something other than prices on resale*. As to resale prices, there is no claim of illegality. *It is therefore not an issue in the case.*

Counsel quote part of the record where certain questions on O.P.A. ceilings were asked and answered without objection (Appellants' Br. pp. 62-65). But the answers brought out nothing. They were all to the effect that the regulations did not touch plaintiff. Apart from this, counsel correctly say that O.P.A. regulations are judicially noticed and are matters of law (Appellants' Br. pp. 62, 66). To question laymen about them is as meaningless as to *take evidence* on any other point of domestic law. The defense of illegality was a matter of applying law to the facts of the case. But the defense could not be raised at all unless pleaded by defendants. They did not plead it.

b. Case Tried on Defendants' Theory That All Occurrences After April 27, 1943, Were Outside the Issues.

The O.P.A. regulations on which defendants now rely went into effect *August 14, 1943*. The claim that it should control is a *reversal of the theory on which the case was tried*.

At the second trial the defendants took the position that plaintiff had elected April 27, 1943 as the date of breach; that damages had to be proved exclusively from data available at that time; and that all subsequent events were irrelevant and outside the issues. On the second trial this entire position was sustained and adopted by the court. See the following excerpts from the record:

(R. 259-61) "Q. What was the value of the same dry wines specified in the agreement referred to in the month of June, 1943?

Mr. Naus. One moment. Objected to, first as immaterial, and, second, as outside the issues, and thirdly, as speaking of a market in June after an alleged election to treat the alleged repudiation on April 27, 1943 as a breach.

The Court. *Sustained on the last ground.*

Mr. Bourquin. May I make the same offer of proof as to the value of the wines specified in the contract in the succeeding months following June 1943, and running down to date?

The Court. Yes. *The ruling will be the same if the objection is the same.*

Mr. Naus. *The objection is the same.*

The Court. Are you satisfied with that?

Mr. Bourquin. Well, I am not satisfied, your Honor.

The Court. I mean so far as what the record will disclose.

Mr. Bourquin. Well, I think if we may have a stipulation, Mr. Naus, that the same objection you would desire be offered if we offer the same questions——

The Court. From June to date.

Mr. Naus. As far as it is within the power of counsel to concede or stipulate to that effect I do so.

The Court. Very well. *The same ruling and exception noted.*

Mr. Bourquin. Your Honor, I feel that I have encountered a ruling that perhaps to the questions to be properly put before the jury where objection would be sustained and *I have exhausted our position.* * * *” (Italics added.)

(R. 262-3) “Q. You told us, Mr. Bercut, that the value of the wines specified in the complaint—in the month of May, 1943, the value in the market was \$6 for the dry wines, \$6.25 for the sweet; is that true?

Mr. Naus. Objected to as repetitious, and *objected to upon the further ground* that it is now the intent to inquire further about a value at a date *subsequent to the date elected by the plaintiff as a breach, to wit, April 27, 1943.*

The Court. Are you adding something to it? *Did you add to it the month of May?*

Mr. Naus. Yes.

Mr. Bourquin. Perhaps, your Honor, that is correct. I formerly did ask him for the month of May.

The Court. Objection sustained.”

(R. 263-4) “Mr. Naus. At this time, if the Court please, in view of the apparent misunderstanding, in the record, I now move the court to strike out the previous answer given a while ago by the witness with respect to that value in the market in the month of May, 1943, and to which he answered six dollars, upon the ground that the objection that has been made should

have been sustained, *and upon the further ground that it relates to a date other than the day of breach.*

The Court. Well I suppose for the purpose of clearing the record so there will be no misunderstanding, that that motion ought to be granted. *It is granted* and you may proceed with your examination.

Mr. Bourquin. And we may have an exception to the ruling?

The Court. Yes.” (Italics added.)

A little earlier, at R. 255-6, there was the following:

“Mrs. Herzig. Q. Mr. Lusinch, did you participate in a transaction on behalf of the Bercut Bros., or P. & J. Cellars, with the Utah Liquor Authority in 1943?

Mr. Naus. If the court please, before making an objection that I am about to make I will inform your Honor that at the former trial this witness referred to a matter of that nature *that did not occur until as I recall, about September of 1943.* Having that in mind, and knowing that that is undoubtedly what Mrs. Herzig has in mind, *I object to that question as being outside the issues.*

The Court. *It is outside the issues.* Objection sustained.

Mr. Bourquin. Exception.”

These objections and rulings clearly define the theory of law which was followed in the trial court. It was that plaintiff had elected to consider April 27, 1943 as the date of breach; that damages must be calculated as of that date upon the evidence available on that date, in other words, upon the basis of fore-

sight; that plaintiff does not have the benefit of hindsight from subsequent events, and that all occurrences later than April 27, 1943 are immaterial. This theory is so clearly developed that it is obviously not changed by counsel's brief and abortive attempts to interrogate lay witness on questions of OPA law near the end of the trial.

Whether the foregoing theory is right or wrong, it was propounded by defendants, and adopted by the District Court on defendants' importuning. *Under it the defendants succeeded in excluding the plaintiff's proof of events subsequent to April 27, 1943.* Having ruled out the plaintiff's evidence, as beside the issues, defendants cannot now rely on such later developments themselves. Their theory makes immaterial any O.P.A. regulation or other law which was not enacted until after April 27, 1943. The O.P.A. regulation on which they rely was enacted August 9 and effective August 14, 1943. If events after April 27 are immaterial, they are just as immaterial to reduce damages as to enhance them.

Having adopted this theory in the District Court, appellants cannot seek a reversal by asking the Circuit Court of Appeals to adopt the opposite theory. See the following authorities:

3 *Am. Jur.* 433-4:

"A party who prevents the adverse party from introducing evidence offered to establish a proper measure of damages may thereby estop himself from complaining of a charge which submits a different measure of damages."

Citing

Halsey v. Minn. So. Car. Timber Co. (1934),
174 S.C. 97, 177 S.E. 29, 100 A.L.R. 1,

where it was said (177 S.E. 29, 39):

*“Did the court err in his charge as to the measure of damages? * * **

This last issue takes on a curious complexion. It is alleged as error that the court charged that the measure of damages would be the shortage in feet computed at \$7.28 per thousand feet, because * * * there is no evidence in support of that figure as the value of the timber.

It is alleged in the complaint that that is the approximate value per thousand feet of 19,215,000 feet of timber which plaintiff claims he was assured was on the Hutto and Wiggins tracts. * * * *On the trial when plaintiff sought to prove the value of the several sorts of timber on the purchased property he was met with objection on the part of defendant * * ** The objection was sustained. Although the answer denied this allegation of the complaint, the defendant offered no testimony to show the value of the timber. Later the plaintiff testified without objection that the value of long leaf pine was \$10 per thousand feet, and that of short leaf pine \$6 per thousand feet. * * *

It would seem that the defendant is not in a position to object that there is no evidence that the average price of the lumber was \$7.28 per thousand feet. By its objection it prevented plaintiff from proving the value of each sort of timber from which the average price could have

been ascertained, and it offered no such testimony itself.” (*Italics added.*)

This case is as similar to the present case on its facts as two cases may well be. The defendants excluded evidence which the plaintiff offered; they offered no corresponding evidence of their own (in the present case: evidence of events subsequent to April 27, 1943. The quoted examination of Elman brought out nothing.). Then defendants try to take advantage of this situation by objection to instructions. In the *Halsey* case they objected to the *giving* of an instruction; in the present case to *refusal of a request*. In the *Halsey* case the instruction was given *in spite of* the situation created by the defendant's objection. In the instant case, the refusal of the instruction was *in accord with* the theory underlying those objections. The present appellants have, if anything, less ground for complaint. The case at bar is more favorable to the appellee.

The general principle that an appellant must stick to the theory which he induced the trial court to adopt is well recognized both in Federal and California decisions. See for example: *Dunn v. U. S.*, 284 U.S. 390, 76 L. Ed. 356, 358:

“The case was tried on the assumption that the indictment was good as to that count, and we should make the same assumption.”

Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. Ed. 358, 359:

“In short, at the trial the defendant in no way saved its rights to deny that the parties were

engaged in interstate commerce at the time of the accident, or to object to the application of the Federal statute. On the contrary, without qualification it invoked and relied upon that statute and the rights that, because of that statute, it supposed itself to possess. There is an ambiguous assignment of error that the supreme court of the state erred in holding as matter of law that the plaintiff was engaged in interstate commerce, and in holding that the question of the plaintiff's assumption of the risk was for the jury, 'thereby depriving the appellant of a right guaranteed to it under the provisions of the Federal Employers' Liability Act'. But if the first clause is more than an introduction to and reason for the second, then, as we have indicated, no foundation for such an assignment was laid in the proceedings before the state courts. Therefore even if the courts and parties were wrong about the proper basis for the suit, that fact does not entitle the defendant to have the judgment reversed. It cannot complain of a course to which it assented below."

Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 615;

Busch v. L. A. Ry. Co., 178 Cal. 536, 539.

The following cases hold specifically that the appellant cannot change his position with respect to the measure of damages:

Merrill v. Kohlberg, 29 Cal. App. 382, 386:

"Counsel for the plaintiff endeavored to present the case upon that theory, but was thwarted in his efforts to introduce evidence of the cost of manufacture by the insistent and successful objection of the counsel for the defendant that 'such

evidence was incompetent, irrelevant and immaterial, as the true measure of damages was (otherwise)'.’’

* * * * *

(pp. 386-7) “After having led the court into error and compelled counsel for the plaintiff to adopt and conform to an erroneous theory for the trial and determination of the case, it surely does not lie in the mouth of the defendant to insist in support of the appeal that the case should have been tried on the theory first adopted by the plaintiff, which counsel for the defendant now contends to be the correct one (cases).’’

St. Louis, K. & S.E. R. Co. v. Ballard, 172 Ark. 151, 287 S.W. 738, 739 col. 2;

McDonald v. McNinch, 63 Mont. 308, 206 Pac. 1096, 1098.

Under these authorities the appellants’ position in the trial court rules out the position which they attempt to take now. There they claimed that everything subsequent to April 27, 1943 was outside the issues and immaterial. They cannot now rely upon an O.P.A. regulation which was not promulgated until August 9, 1943 and did not become effective until August 14, 1943. Nor can they assign error for the court’s refusal to instruct according to that regulation. Upon the record the plaintiff’s proof of lost profits was not limited to 25%.

c. Summary.

The O.P.A. 25% limit on wholesalers, promulgated August, 1943, has nothing to do with this case. In the first place, it is an attempted defense of illegality

which defendants waived by not pleading it. In the second place, the case was tried on defendants' theory that everything after April 27, 1943 was outside the issues. This latter theory must be adhered to on appeal.

2. Question of Fact Whether 25% Provision Covers Plaintiff; Categorical Instruction Error.

If we were to concede that defendants could claim an O.P.A. regulation of August 27, 1943 was applicable to the case, and that such a regulation affected prices established *before its promulgation* the District Court was still right in refusing to instruct categorically that plaintiff was limited to a 25% markup. That is so *first* because Maximum Price Regulation 445 which makes the 25% provision attempts to fix prices only for *wholesalers* and *retailers*. On the other hand *processors* are subject to the General Maximum Price Regulation (see MPR 445, Sec. 4.1) and the record contains evidence sufficient to sustain a finding that plaintiff was a *processor*. An instruction that plaintiff was bound as *matter of law* by MPR 445's 25% limit on *wholesalers* would therefore have been error.

Second MPR 445 is not intended to alter price schedules established before its date.

Third since MPR 445 became effective August 14, 1943, it applied only to sales made on or after that date. The record, however, contains evidence which would support a finding that all of the wine could have been sold before then.

Any of these considerations makes appellants' proposed instruction at least partly wrong. The trial court was therefore justified in refusing it.

We shall take up each of the three objections to the instruction, and shall give the authorities that an instruction which is wrong in part or even misleading may be refused entirely.

a. Instruction Erroneous Since Evidence Supports Finding That Plaintiff is Processor.

As stated above, the 25% markup on which appellants' rely applies to wholesalers (MPR 445 Sec. 5, 4(b), 8 Federal Register 11161, 11168). Processors are put under the General Maximum by Section 4.1 (8 Fed. Reg. 11161, 11166); as are sellers who have wine processed for their own account (MPR 445 Section 5.1(b)(2)). *It is undisputed that plaintiff's list prices are legal under the General Maximum Price Regulation.* The respective definitions are contained in Sec. 7.12(b):

(8 Fed. Reg. 11161, 11173) (2) 'Processor' means any person who:

* * * * *

(ii) Bottles under any brand name distilled spirits or wine belonging to him * * *.

(iii) Causes distilled spirits or wine to be bottled or blended for his account under his own brand name.

"(3) 'Wholesaler' means any person (except a monopoly state or primary distributing agent) engaged in the business of buying and selling dis-

tilled spirits and/or wine *without changing the form thereof*, to persons other than consumers". (Italics added.)

The key to the question is whether plaintiff "bottles" or "causes to be bottled" the wine "under any brand name" or whether it sells the wine "without changing the form thereof". In the first case plaintiff would be a processor, in the second a wholesaler.

The only reason why the case presents a problem on this score, is that the *defendants* aged some of the wine in bottles. Had the wine been in bulk, and put into bottles by the plaintiff, there would be no question but that plaintiff was a processor under the above definitions. As to the unbottled 33,309 cases plaintiff was clearly a processor. And that was true regardless of whether the price had been fixed definitely enough to form a basis for calculating damages. But although defendants kept part of the wine in bottles, it is nevertheless true that plaintiff *completed* the *bottling process*, that plaintiff *changed* the form of the goods in certain respects, and that plaintiff sold under its own brand label. In its general business Park, Benziger was a processor—it was affected by the freezing of *bulk* wines (A. 72) and sold under its own label (see *supra* p. 26). In the Bercut deal plaintiff was to do any processor's work which was necessary upon bottle-aged wine: clean and polish the bottles, wrap them in tissue paper (R. 160-61, quoted as part of Elman's testimony in Appendix "A"); and plaintiff was going to affix the Park-Benziger label (R. 96-7, 151). Elman summed up his work in San

Francisco as (R. 101) “working and arranging for the *bottling* of those wines.” All this testimony taken together supports the finding that plaintiff “bottled” (i.e. completed bottling) the wines even though they were partly aged in bottles by the seller. Plaintiff did not sell the wines as they came out of the cellars, but polished, wrapped and labeled them so as to make them more attractive to the trade and more marketable. They were admittedly to be sold under plaintiff’s brand name. Plaintiff’s handling of the goods does not come within the above definition of wholesaler who sells merchandise “*without changing the form thereof.*”

Since there is evidence to support a finding that plaintiff was a processor of the Bercut wines, it would have been error to instruct categorically that plaintiff was subject to the 25% limit. Such an instruction amounted to saying that the plaintiff was a wholesaler *as a matter of law*, in disregard of the above evidence to the contrary. Since the instruction would thus have been contrary to the evidence, it was properly refused.

b. MPR 445 Not Applicable to Price Schedules Established Before Its Date.

At appellants’ brief page 62 counsel argue that OPA price regulations *may be* made to override pre-existing contracts. The power may be conceded, but we still have the problem of construction, whether a given regulation is intended to be retroactive or not. And appellants’ own authorities indicate that MPR 445 was not intended to be retroactive.

Counsel cite *Long Island Structural Steel Co. v. Schiavone-Bonomo Corporation*, 142 Fed. (2d) 557 (CCA 2), affirmed upon the District Court opinion, 53 Fed. Supp. 505. This case involved the maximum on scrap-iron and steel. Section 1304.1 of Revised Price Schedule No. 4 Iron and Steel Scrap is quoted at 53 Fed. Supp. 506. It contains the express provision that its terms shall apply “*regardless of the terms of any contract of sale or purchase or other commitment theretofore entered into*”.

The same is true of the regulation on Cotton Gray Goods, Price Schedule No. 11, Section 1316.2 quoted in *In re Kramer & Uchitelle, Inc.*, 288 N. Y. 463, 470.

This shows that when price regulations were intended to be retroactive, they were so drafted in unmistakable terms.

MPR 445 on the other hand contains no such provision. It contains only the conventional repealing clause to the effect that prior regulations are superseded (Sec. 5.1(c)). And it expressly exempts sales under price lists *published under state law before August 19, 1943* (Sec. 5.10):

“Provided, That this Article shall not apply to any sale which a wholesaler, retailer or primary distributing agent is required by statute, ordinance, or regulation to make at a price posted or listed prior to August 14, 1943, with a state or other public authority (if the price so posted or listed is greater or less than that established by this Article for such sale) until on and after the first effective date for prices so posted and listed at the first opportunity after August 19, 1943.”

Apart from this, it is a well settled principle of interpretation that a statute will not be construed retroactively unless expressly made so (50 Am. Jur. 495 citing *inter alia*: *Hassett v. Welch*, 303 U.S. 303, 314, 82 L.Ed. 858).

Accordingly MPR 445 must be held not to disturb price schedules, approved and established before August 19, 1943. Compare also Elman's testimony, R. 335.

It would therefore have been error to instruct the jury that plaintiff was subject to the 25% limit of MPR 445.

c. Evidence That Wine Could All Have Been Sold Before Effective Date of MPR 445.

This subject may also be considered from another standpoint. Maximum Price Regulation 445 was promulgated August 9, to be effective August 14, 1943. It obviously did not affect sales made before its enactment. Not only were the damages in the present case taken as fixed on April 27, 1943, but there was no evidence to show that the wine could not all have been sold before August 14, 1943. In fact, all the evidence was the other way. Prospective wine purchasers were driving sellers "crazy" (Cholet R. 233). The only limitations on sales would have been the instalment deliveries from the Bercuts. From the state of the wine market it can readily be inferred that buyers would have been glad to buy the future deliveries on forward contracts, and even to pay cash in advance for them.

Thus the record supports the finding that the entire profit could have been made before M. P. R. 445 saw the light of day.

d. **Instruction Properly Refused if Wrong, Partly Wrong or Misleading.**

If a proposed instruction is incorrect it is properly rejected. Even where it is incorrect in part, the court may reject the whole of it. See:

Miles v. Lavender (1926), 10 Fed. (2d) 450 (C.C.A. 9).

(p. 455) "Furthermore it was but a paragraph in a request, part of which was clearly incorrect, and the court was under no duty to separate one portion from another, but was justified in refusing the whole request."

Haffin v. Mason (1873), 82 U. S. (15 Wall.) 671, 21 L. Ed. 196, 197.

"the proposition which the court was asked to sanction assumed the liability of both [defendants] and a party cannot assign for error the refusal of an instruction to which he has not the right to the full extent as stated, nor is the court bound to modify the instruction moved for by counsel, so as to bring it within the rules of law."

To the same effect:

Chicago G. W. R. Co. v. Robinson (1939), 101 Fed. (2d) 994, 999, citing many cases (C.C.A. 8);

Keene v. Kelly, 49 Fed. (2d) 874, 876 (C.C.A. 1);

American Surety Co. v. Blount C. Bank, 30 Fed. (2d) 882, 884 (C.C.A. 5);
Catts v. Phalen (1844), 43 U. S. (2 How.) 376, 382, 11 L. Ed. 306.

Even where an instruction is simply *misleading* there is no error in refusing it.

Panama R.R. Co. v. Johnson, 264 U. S. 375, 68 L. Ed. 744, 755.

“The defendant also complains that two requests which it preferred on the subject of assumption of risk were denied. The requests were so framed that, considering the state of the evidence, they would not have conveyed a right understanding of the subject, and might well have proved misleading. Their refusal was not error.”

American Surety Co. v. Blount C. Bank, *supra*.

These cases cover every phase of the appellants' requested instruction on 25% markup. Either it was incorrect as disregarding the evidence tending to show that plaintiff was a processor, not a wholesaler; or it disregarded the evidence tending to show that wine could all have been sold before August 14, 1943. There was therefore no error in refusing to give the instruction.

3. Instruction Properly Refused as (a) Oral and (b) Too Late.

Appellants' request for an instruction on the supposed 25% limit was made orally when the jury came in with a question (R. 526, 535).

We are dealing with the second trial of the case. Defense counsel knew the issues and the evidence before they started. Previous to the close of the evidence

counsel requested one and only one instruction on price maxima, as follows:

(Defense Request No. 36, R. 62.)

“In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to determine net profits, I instruct you that you cannot in any event use a greater markup by plaintiff over the cost to it than the markup permitted under OPA regulations as a price ceiling; ~~and the burden of proof is on the plaintiff.~~

Davis v. Carnegie Steel Co., 6 Cir., 244 Fed. 931, 934;

Molyneaux v. Twin Falls Canal Co. (Idaho), 94 A. L. R. 1264, 1277, 35 Pac. 2d 651, 659.

Given St. Sure, D J”

This instruction the court gave, striking out only the reference to the burden of proof (R. 505-6, 520). (Since illegality is an affirmative defense under Rule of Civil Procedure 8 (c), the burden of proof is evidently upon the defendants). No more specific request in writing was ever made. None more specific request of any kind was made until after the jury had retired and returned. The fact that the jury should have asked about the August 1943 ceiling at all simply means that defendants had put over a point to which they were not entitled (see pp. 28-39, supra). Rule of Civil Procedure 51 requires requests for instruction to be made at the close of the evidence and in writing. Since the request was made after the retirement of the jury and orally it was objectionable on both grounds and therefore was properly refused.

Flexibilis Werke etc. v. Hess, 205 Fed. 850 (C.C.A. 3), is directly in point. The Third Circuit Court of Appeals said:

(p. 856) “Sometime after the jury had retired they returned to the courtroom and asked for further instructions; that is, that the court would *more fully define* the meaning of the secret process. In response, the court proceeded, first, to define what is not a secret process, * * * Then after calling their attention to the question as to what secrecy might or might not attach to the separate steps in the process, the court concludes * * *

(p. 857) After the court had thus instructed the jury, counsel for the plaintiffs asked that they be further instructed,

‘That there is the possibility of a secret process being composed of a combination of well known materials.’

Counsel proceeding to elaborate the instructions thus asked for, *was stopped by the court, on the ground that counsel’s opportunity for submitting points had passed when the case had been submitted to the jury*, and the further instruction, as requested, was therefore refused. *In this refusal the court was justified. The orderly practice in the conduct of trials in the District Court does not permit that where a jury on its own motion returns to the court for further instruction, the case should again be opened for argument, or the submission by counsel on either side of further points for instruction.*” (Italics added.)

This case accords with the literal provisions of the new Rules (51), so we submit, is still authority.

A decision under the new rules, holding that the instruction is properly refused where the request is not in writing is: *Dallas Ry. & T. Co. v. Sullivan*, 108 Fed. (2d) 581 (C.C.A. 5).

For earlier cases to the same effect, see:

A. T. & S. F. v. Gamble, 177 Fed. 644, 652 (C.C.A. 9) (too late);

Keystone Bank v. Safety Banking & Tr. Co., 179 Fed. 727 (C.C. E.D.) (oral).

In the present case the court responded to the jury's request by calling their attention to Elman's testimony on O.P.A. ceilings. *This was done by stipulation of both sides.* The testimony had been elicited by defense counsel's questions, and was the only thing in the record on the subject (R. 533—the reference to the typewritten transcript is to R. 334-5, beginning "Mr. Naus: No I am not trying to qualify you" and ending "We would have kept the same prices"). The court's remarks as to what it might do in the event of another request from the jury, are hypothetical and beside the point (R. 535 ft.). *Under the authorities cited the court was justified in refusing counsel's oral request for further instructions when the jury returned.* That disposes of this phase of the case.

B. PLAINTIFF'S RIGHT TO LOST PROFITS NOT AFFECTED BY NOTICE.

Appellants' other attack upon plaintiff's damages for loss of profits is on page 70 of the brief. This in effect argues that plaintiff cannot recover for "extraordinarily high" profits unless the defendant had previous notice of plaintiff's resale contracts. The

Wisconsin case of *Guetzkow Bros. v. Andrews*, 92 Wis. 24, 66 N.W. 49, is cited.

There are three answers to this.

1. In the first place the entire proposition is put forth as a corollary to the rule of *Hadley v. Baxendale*. We have already shown that the instant case does not come under that rule, and that appellants' discussion of it results from a confusion of issues. The rule of *Hadley v. Baxendale*, including the entire principle of notice to the defendant, is a rule of *special damages*. In the present case plaintiff made no attempt to show special damages and the problem before the court is the rule of *general damages* for breach of a contract to sell goods not otherwise available on the market.

2. There is nothing to show that plaintiff's markup was "unusually high". Furthermore, it may be inferred that defendants had knowledge of plaintiff's probable profits. They were businessmen of long and wide experience, and themselves told Elman that they expected the price of wine to go up (R. 122, 180).

3. Finally the *Guetzkow* case was effectually disapproved in *Edwards Mfg. Co. v. Bradford*, 294 Fed. 176, 182-5 (C.C.A. 2). The opinion discusses *Guetzkow v. Andrews* and does not follow it (294 Fed. 176, 185).

C. SUMMARY.

The court correctly instructed the jury on the measure of damages. On the record, plaintiff was not bound by a 25% ceiling or any limitation *other than its published lists*. Such ceiling involves an attempt

to raise the issue of illegality which had not been pleaded. Furthermore, it depends upon M.P.R. 445, enacted after April 27, 1943. Defendants took the position and induced the trial court to hold that all matters after April 27, 1943 were irrelevant. That theory cannot be changed on appeal. Finally an instruction imposing a 25% limit would disregard evidence that plaintiff *processed the goods*, and would also disregard evidence that the wine could all have been sold before August 14, 1943, the effective date of MPR 445.

Nor is plaintiff's right to prove lost profits dependent upon any advance notice to defendants.

V. NO ERROR IN INSTRUCTIONS AS TO BURDEN OF PROOF.

At appellants' opening brief page 60, counsel complain about supposed failure to instruct on the burden of proof.

The first answer is that the court *did* instruct on the burden of proof. Defendants' contention is simply not supported by the record. In addition, defendants cannot claim error, because they did not except to the supposed omission.

A. COURT INSTRUCTED ON BURDEN OF PROOF.

1. By their second request for instruction (R. 40) defendants limited the issue of liability. The contract was admitted by the pleadings (Ans. to Amended Compl. par. II, R. 22). By their second request de-

defendants admitted that they delivered no wine, and *staked everything upon a supposed abandonment of the contract*. In other words the *issue of liability was made to turn upon an affirmative defense*. (See Rules C.P., 8(c) “waiver, or any other matter constituting an avoidance or affirmative defense”). As to that *the burden of proof was on the defendants* and the court so instructed (Plaintiff’s request, No. 11, R. 33, given in part at R. 513. Defendants took no exception, R. 500-501.).

2. This leaves the issue of damages. Defendants requested two instructions upon the burden of proof as to damages. One was erroneous and was refused; the other was correct and was given.

The erroneous request was contained in the last sentence of defendants’ request No. 36 (R. 62). It purported to tell the jury that plaintiff had to prove the legality of its prices under O.P.A. regulations. We have seen that illegality is an affirmative defence (Rules C.P. 8(c)). Furthermore, a person’s acts are presumed to be legal; he does not have to prove legality at every step. So the court was clearly correct in refusing this part of the request and defendants took no exception to the refusal (Appellants’ Op. Br. p. 60).

Defendants’ other request touching the burden of proof was given. It is Defense Request No. 31 (R. 57) which the court gave at R. 521. It says in part:

“Now, even though the law lays down the rule that in case of a seller’s breach of an obligation to

deliver goods not obtainable elsewhere the buyer's damages may be measured by his loss of profits, nevertheless *the buyer must make proof* showing that it was reasonably certain that profits would have been made." (Italics added.)

To say that "the buyer must make proof" is equivalent to saying that the burden of proof is on the buyer. The language may be quaint, but then it is the language of defendants' counsel.

Had defendants desired other instructions on the burden of proof of damages, they could have asked for them. As it was, the court gave all their sound requests. Defence counsel's remark at R. 505-6 that he assumed the court would instruct on the burden of proof in stock instructions has no significance whatsoever. It was made *on the day after* all the requests had been discussed—in other words, too late. *Furthermore Defence Request No. 2 (R. 40) had placed the burden on defendants and made inapplicable all the ordinary burden of proof instructions so far as the issue of liability was concerned.* Under the circumstances defence counsel had no right to rely upon stock instructions on this subject. The court merely acquiesced in counsel's refusal to except (R. 506). *Scarborough v. Urgo*, 191 Cal. 341 (Appellants' Br. p. 60), was a negligence case in which the trial court erroneously applied the doctrine of *res ipsa loquitur*. It obviously has no pertinence here.

B. NO EXCEPTION FOR ALLEGED FAILURE TO INSTRUCT.

Defendants took no exception to any supposed failure to instruct on burden of proof. In one instance the refusal to take exception was express (R. 505-6). They did not even take exception to the court's supposed failure to include a stock instruction on burden of proof. This would have been feasible even after completion of the court's charge, since plaintiff opened the door by itself taking an additional exception (R. 524-5). Instead of following suit, defence counsel stood upon the exceptions taken the day before and objected to plaintiff's line of action (R. 526). Defendants cannot now raise a point to which they took no exception at the trial.

C. SUMMARY.

There was no error in instructions on burden of proof. Defendants assumed the burden of proof on the issue of liability; the court gave a requested burden of proof instruction on the issue of damages. Besides, defendants saved no exception to this part of the charge.

**VI. COURT CORRECTLY MODIFIED DEFENDANTS' REQUEST
NO. 35 (Appellants' Br. pp. 71-4).**

The contract between plaintiff and Serge Hermann provides that Hermann shall receive "50%" of the net profit (R. 91). Defendants claim that *net profit* is a figure to be reached *after deduction* of the fifty per cent!

This is contrary to the language of the contract which clearly assumes that net profits have been determined *before the deduction*. We believe that the situation is in every respect covered by the following language of *Russ v. Tuttle*, 158 Cal. 226:

(p. 230) "It is urged, however, that the jury might have found the damage to be less, because of the fact that there was testimony tending to show that the plaintiff, after taking the option, had assigned the whole or a part of it to one Buhne. Neither of these circumstances would affect the applicability of the code section. The damage occasioned by the breach of the contract was defined by the statute. That damage was recoverable by the party or parties maintaining the action. Whether the plaintiff after recovery would be bound to account to Buhne for a part or all of the amount received by him was a question between him and Buhne. The defendant was in no way concerned in it. In fact, the point urged does not at all bear on the measure of damages, but goes rather to the question whether the plaintiff was the real or the sole party in interest, and as such authorized to bring the action in his own name. * * *

(p. 231) Furthermore, it may be doubted whether the defense that the plaintiff was not the real party in interest would have been available to the defendant even if properly pleaded. In *Giselman v. Starr*, 106 Cal. 651 (40 Pac. 8), it is held that 'where the plaintiff shows such a title as that a judgment upon it satisfied by defendant, will protect him from future annoyance or loss, and where, as against the party suing, defendant

can urge any defense he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object' * * * A judgment in favor of plaintiff will, therefore, protect the defendant against any claim by Buhne. So far as such defendant is concerned, the question of who is the real party in interest as between Russ and Buhne is immaterial."

Followed in

Anglo-Cal. Nat. Bank v. Lazard, 106 Fed. (2d) 693, 699 (C.C.A. 9).

Furthermore in all of the following cases where an employee is given a percentage of "net profits", "net profits" is arrived at *before deduction* of the contingent commission:

Swerdfeger v. U. Acc. Corp., 9 Cal. App. (2d) 590;

Boradari v. Peterson, 86 Cal. App. 753;

Read v. Forced Underfiring Corp., 82 Utah 529, 26 Pac. (2d) 325;

Wallace v. Beebe, 94 Mass. (12 Allen) 354, 357;

Foster v. Goddard, 9 Fed. Cas. 534, 541.

VII. COURT CORRECTLY REFUSED DEFENSE REQUEST NO. 37 (Appellants' Br. p. 74).

Defence request No. 37 attempts to apply a principle which does not exist in the law of sales. The case which appellants cite was on a contract for services, i.e., to slaughter and pack hogs. Appellants

made the same point in the District Court, but neither there nor here have they been able to find a *sales* case to support them.

The rule of damages for breach of a contract of *sale* was correctly stated by the court in its instructions.

Furthermore, appellants defeat their own argument in trying to bolster it (Appellants' Br. p. 80). They say that the contract was to be performed during a period of shortage. *This would make the plaintiff's risk in reselling practically zero.* Wine prices could "collapse" only if the French and Italian wine business got back to its pre-war level which was unlikely and has not happened. Even if defendants were entitled to their request in the present *sales* case its omission could not be prejudicial.

VIII. APPELLEE'S REQUEST NO. 10 WAS CORRECT

(Appellants' Br. p. 77).

The court gave plaintiff's request No. 10 (R. 32-3):

"Plaintiff's Instruction No. 10

You are instructed that the defendants have raised the defense of plaintiff's alleged inability to pay for wine which the plaintiff purchased under the contract. You are instructed that the defendants were not justified in repudiating the contract unless the plaintiff were actually insolvent. The burden of proving such a defense is on the defendants. You are instructed that no evidence has been offered tending to show that the plaintiff is

or ever was insolvent. Mere doubts of the solvency of the other party afford no defense to the party who refuses to perform the contract according to its terms because of such suspicion.

3 Williston Rev. Ed. p. 2475.

Given St. Sure, D J''

Defendants raised the supposed inability of the buyer (Fourth Defence, R. 24). This question is considered in 3 *Williston on Contracts* (Rev. Ed.), Section 880. The plaintiff's instruction No. 10 follows Williston's text. Defendants asked the court to apply Section 881 of Williston instead. That section, however, deals not with payment of money but with *delivery of specific property* not in the possession of the *seller*. Whatever may be the rule in such cases, a different rule governs the question of the *buyer's ability to pay*. The difference is recognized in *Gray v. Smith*, 83 Fed. 824, 829, a Ninth Circuit case, cited in *Brown v. Lee*, 192 Fed. 817, on both of which defendants rely.

The buyer's ability to pay is governed by Section 880 of Williston, which is embodied in the instructions. It may be added that the Civil Code (Sec. 1511) enumerates excuses for nonperformance and does not include the other party's financial *inability*. The instruction was, if anything, too favorable to the defendants. Defendants misstate *Western Grocer Co. v. New York Oversea Co.*, 28 Fed. (2d) 518. The case gave judgment for the plaintiff buyer. It contains a dictum (28 Fed. (2d) 518, 520), that the *seller* could

not sue the buyer for anticipatory breach if the *seller* was unable to make delivery of the property he was supposed to sell. This accords with the above distinction between contracts to pay money and contracts to deliver specific property. *Peterson v. Wellsville City*, 14 Fed. (2d) 38, involved a grading contract, not a contract of sale. It is cited in support of the dictum in *Western Grocer Co. v. N. Y. Oversea Co.* Plaintiff's Instruction No. 10 stated the correct law respecting *contracts to pay money*.

IX. CONCLUSION.

Loss of profits is a proper measure of *general damages* where the seller fails to deliver goods which cannot be obtained elsewhere. The record contains sufficient evidence from which to form an estimate of plaintiff's probable profits.

Upon the record these profits were not affected by an O.P.A. ceiling promulgated in August, 1943, since defendants tried the case on the theory that everything subsequent to April 27, 1943 was outside the issues. Defendants proposed instruction on this subject was also objectionable on other grounds, and was properly refused for the procedural reason that it was requested orally and after the jury had retired. The court properly held that Hermann's 50% should not be deducted from the recovery.

Appellants' other contentions are likewise unsound.

The judgment should be affirmed.

Dated, San Francisco,

January 3, 1944.

Respectfully submitted,

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(Appendices A and B Follow.)

Appendices A and B.

Appendix A

APPELLANTS' MISSTATEMENTS OF RECORD.

(References indicated by letters "A.O.B." are to pages of Appellants' Opening Brief.)

(A.O.B. 3, ft.) "Prior to the contract with appellants Bercut, neither Serge Hermann, nor his wife, had ever bought or sold wine on their own account (R. 187), with the single exception of a previous transaction, relating to one carload, with a man named Feldheym (R. 187)."

This construes the evidence favorably to the appellants instead of the appellee. The testimony is as follows:

(R. 186) "Q. That Chateau Montelena of California, that is the business that this Mr. Feldheym is connected with?

A. Was connected * * *."

(R. 187) "Q. Did you come out here solely to settle that controversy or did you come out for some other purpose?

A. I came for the purpose of finding wine. I had to come to California several times a year. I have done that for the last several years. It was not my first trip to California.

Q. Well it is the *first trip to California* in which you ever attempted to buy wine *for your own account*, isn't it?

A. Absolutely not, because I closed a contract with Chateau Montelena the year prior.

Q. I asked you if that transaction between your wife under the name of Chateau Montelena of New York, that transaction, the one with Feldheym, was the first transaction in which you or

she had ever sought to buy wine on your own account?

A. That is correct. We used a wholesaler's license there because we had that line.

Q. Up to that time, you had been simply a middleman or broker?

A. Correct."

Counsel's last two questions here confused Chateau Montelena of California and Chateau Montelena of New York; no previous question had been asked as to whether that was the first time that Mr. and Mrs. Hermann had ever acted on their own behalf. The only question was whether that was *the first trip to California made on their own behalf*. This is the meaning which must be given to the entire passage under the rule that when testimony is subject to two interpretations the one must be adopted which favors the appellee (unless perhaps where "clearly erroneous"). *Gates v. Gen. Cas. Co.*, 120 Fed. (2d) 925, 929 (CCA 9); *U.S. v. Ingalls*, 114 Fed. (2d) 839, 842; *Helvering v. Johnson*, 104 Fed. (2d) 140, 141, aff'd 60 Sup. Ct. 293; *U. S. v. Gamble-Skogmo*, 91 Fed. (2d) 373, 374; *Columbian Nat. L. Ins. Co. v. Comfort*, 84 Fed. (2d) 291, 292.

(A.O.B. p. 5) "Hermann came to San Francisco and in a roundabout way learned that appellants Bercut were holding a stock of wine (which turned out to be the 26,691 cases later covered by the contract) * * *."

Whether the contract price was definite as to more than 26,691 cases is the question considered in our cross-appellant's brief. But there is no question that

the stock consisted of, and the contract referred to, 60,000 cases, not merely 26,691.

(A.O.B. p. 10) "It had simply happened that in February 1941, or two years before the deal with Hermann, the Bercuts had obtained majority control and management of a cold storage business in San Francisco, known as Merchants Ice and Cold Storage Company."

It is common knowledge such things don't "simply happen".

(A.O.B. p. 26) "There is no evidence that any orders were taken or sales made under either list."

The record is contrary. Elman testified (R. 298):

"Mr. Bourquin. Q. Mr. Elman, prior to the date of April 27, 1943, had your concern, Park, Benziger, sold or made any commitments for the sale of any of these wines?

A. We did make a commitment * * *.

Q. You did make a commitment?

A. We did make a commitment for the sale of that wine to one of our wholesalers.

Mr. Bourquin. Q. Without telling us what it was, when you say you made a commitment, what was the nature of your commitment?

A. Took an order for it.

Q. Took an order, accepted an order?

A. Yes.

Q. For how much and what type of wine?

A. 1200 cases of the P & B California wines, which we had purchased from the Bercuts.

Q. Dry or sweet?

A. They were mixed."

Elman's testimony at R. 330 implies that this order was given after the customer saw the price list. Moreover it certainly is to be presumed that sales were made according to the price list since the price lists were posted under requirement of the laws of New York (R. 305, 308, 312, 315, 316).

(A.O.B. p. 27) "In addition to that, Elman who was not an accountant or auditor and who did not produce any accounts or books, assumed that the appellee would have an overhead expense of six per cent of the selling price."

Elman was vice-president in charge of sales and promotion, and testified from his knowledge, did not merely "assume". See,

(R. 69) "Q. And you are connected with the Park, Benziger Company, are you?

A. Yes, sir.

Q. What is your connection with the corporation?

A. I am the vice-president."

(R. 70) "Q. You are the vice-president?

A. In charge of sales and promotion.

Q. Sales and promotion, that is the function committed to you, is it?

A. Yes, sir.

Q. How long have you been with Park, Benziger?

A. Since 1939, sir."

(R. 301) "Q. Mr. Elman, you told us the other day that you as vice-president were charged with the sales and promotion of the product of Park, Benziger & Company, is that correct?

A. That is correct, sir.

Q. As such do you or not have to do with the costs or charges that your company incurred in the sales and promotion of those products?

A. Yes, definitely.

Q. Do you know what the costs and charges to your company were and ran in April 1943 for the marketing at retail of commodities of the type and quantity specified in Plaintiff's Exhibit 2 here?

A. Yes."

(R. 302) "The Court. Q. How long did you say you have been with the Park, Benziger Company?

A. Since 1939, your Honor.

Q. I think you said that the business consisted of imported wines and whiskies?

A. Yes.

Q. Did you have anything to do with labeling and marketing those imported wines?

A. Yes, your Honor, I was actively engaged in the sales and promotion of all the merchandise of Park, Benziger.

Q. And you had been since 1939?

A. 1939, yes."

(R. 304) "Q. Mr. Elman, what would the costs and charges for the handling and promotion and sales of wines——

The Court. Such as that described in the contract, Exhibit 2——

Mr. Bourquin. Q. (continuing). ——run you per case, per carload or per thousand cases in April, 1943?

A. About six per cent of the price, the selling price, your Honor * * *

The Court. Q. Whether it was 1000 cases, 5000 cases or 30,000 cases?

A. It was based on the total volume of business we do per year, your Honor.

Mr. Bourquin. Q. It would run constantly irrespective, as the court has asked you, of the number of cases involved?

A. That is right."

(R. 313) "Q. Did the charges that you have given us, six per cent of the selling price, not include your transportation charges to New York?

A. No they did not include the transportation charges.

Q. Do you know what the transportation charges on liquor carloads—what charges prevailed for the shipment of such from San Francisco to Park, Benziger in New York in April of 1943?"

(R. 314) "A. Approximately 35 cents a case.

Q. Approximately 35 cents a case.

A. Freight and insurance.

Q. Were there any other charges accruing to you in the operation of your business in the handling of wines of this type at that time in New York, April 1943, other than I have mentioned, namely, the six per cent operating charge, and you mention the transportation and insurance?

A. None, sir."

(R. 315) "Mr. Bourquin. I will call attention to the prices filed and posted for wholesale by Park, Benziger Company of California P & B Brand * * *"

(R. 319) "The Witness. You want the outline of the costs of that, as I understand?

Mr. Bourquin. Please.

A. This merchandise is posted at these prices f.o.b. San Francisco. Therefore there wouldn't be any question of freight entering into those particular prices, they were sold f.o.b. here.

Q. And insurance?

A. Freight and insurance. There would be no handling on our end of it there, other than a rebilling process for wholesale sale, since it was sold to the buyer here in San Francisco. The only work that we would possibly do would be the rebilling of the merchandise to the people we sold it to. We figured the overhead on that at two per cent, sir.

* * * * *

Q. So in the wholesale you are charged with two per cent, and in the retail six per cent plus 35 cents a case?

A. Transportation and insurance."

(A.O.B. p. 28) "The foregoing is all the evidence laid by appellee before the jury as a basis of supposing or finding a loss of expected profits
* * *."

In addition to the testimony quoted on pages 27-8 of appellants' brief, plaintiff also introduced evidence as to the state of the wine market at the execution of the contract and soon afterwards. See:

Cholet (R. 232-7); Lusinchi (R. 253-4);

(quoted in Appendix "B", *infra*);

Elman (R. 300, 320);

(quoted in part, *supra*).

(A.O.B. p. 28) "Appellee made no proof of the cost of the labels."

Appellee proved that the selling expense on retail sales was 6%. Details could have been asked on cross-examination but were not. See cross-examination of Elman (R. 320-40).

(A.O.B. p. 29) "Any profits made by appellee were immediately paid out by it in the form of dividends to Finlay, Holt & Company (R. 338)."

The testimony is that payments to Finlay, Holt & Company (the present corporation) were made *at the end of each year* (R. 338):

"Q. Then if, as and when Park, Benziger & Company made any profit since, it has immediately been paid out in dividends to Finlay, Holt & Company, hasn't it?

A. Not immediately; at the expiration of the year."

Appendix B

(R. 231-5) Pierre J. Cholet,

called as a witness on behalf of plaintiff; sworn.

“Q. What is your business, please?

A. Wine merchant.

Q. Wine merchant. May I ask how long you have been in the wine business?

A. Ever since 1933 in this country, and previous to that in Europe.

* * * * * *

Q. How long have you been in business in California?

A. Since October, 1942.

Q. Where prior to that time had you done your business in the United States?

A. I was in the East. I had a consulting business in New York up to 1939. Then I became associated with California Wine Sales, of Lodi, California, as Gulf Coast manager, stationed in New Orleans, and covered all the territory of Texas, Louisiana and Florida.

Q. That was what period, please?

A. That was from 1939 to January, 1942; September, 1939 to January, 1942.

Q. Prior to your entry in business in the United States, you said you had been in business in Europe, in the wine business.

A. Yes; my family was in the wine business.

Q. What part of Europe, please?

A. In Tours, France.

Q. So you were born and raised in the wine business?

A. Yes.

Q. At the present time what is the nature of your wine business?

A. Well, producing wine and buying wine, and shipping wine in bulk.

Q. Are you familiar with the wine industry and the circumstances of it in California?

A. Yes, I am.

Q. Were you familiar with it prior to January of 1943?

A. Yes, I was.

Q. Will you please tell us, Mr. Cholet, what was the circumstance of the wine industry, what was the situation in it in 1942 and at the opening of 1943, with particular reference to wines of the types we have spoken of here, still wine?

A. Well, the demand for wine started to become very active in the spring of 1942, and the prices naturally started to climb, as the demand became greater, and several large whisky outfits came into the State of California and started buying wineries and accumulating inventories sometime in the fall of 1942, I believe it was, and created a great shortage, with the result that the majority of the bottlers of the country were without a source of supply, and started coming to California to look for new sources of supply. I was one of them. As a matter of fact, I came here in October because my partner was ill, and there was no sense of being out selling when we had no merchandise for sale. We were brokers at that time, and we were forced into the producing business because we had to get wine.

Q. So you came to California in the latter part of 1942 to meet that situation?

A. Yes.

Q. What was the influence and the progress of the situation from October, 1942 up, on through the early months of 1943?

A. It became much worse, because all these bottlers were here and were knocking at the doors of the wineries, and the producers, every day, and getting everyone crazy, and naturally when the next one came the price had gone up a little bit and no sales had been made. That went on until the time that OPA stepped in to attempt to put a stop to the craze of price raising.

* * * * *

Q. Let me ask you, at that time and on from that period was there any market in California and San Francisco for wine of that type?

A. There was a very active market, and there still is. As a matter of fact, it is still rather difficult, it is difficult for us, especially as wine merchants to find even ordinary wine. We have stopped looking for that class of merchandise long ago.

* * * * *

A. There are many people, such as ourselves, who would like to buy it, and there are many consumers who would buy a bottle directly from the liquor store.

Q. Do you know, and did you know during the period 1943 commencing with the months of March and April and running through the year, whether wines of similar type were being bottled and sold in San Francisco and California?

A. Oh, yes.

Q. Do you know whether concerns were handling similar wines?

A. Yes.

Q. Will you tell us whether or not owing to the influence and demand created, as you have described, since the latter part of 1942, that there has since that time and continues up to now to be a most active market for that type of wine in California that we have ever experienced?

A. Yes, it has.

Q. Do you know, Mr. Cholet, what the price reaction was to those conditions in that type of wine in the months of January, February, March, April and May, 1943?

A. They went up in price."

* * * * *

(R. 253-4) Marcel Lusinchi,
called as a witness on behalf of plaintiff; sworn.

"Mrs. Herzig. Q. Mr. Lusinchi, will you please state your business?

A. Division merchandise manager, City of Paris Dry Goods Company.

Q. How long have you held that position?

A. Around nine years.

Q. Do you live in San Francisco?

A. Yes.

Q. Now, Mr. Lusinchi, in your position have you purchased wines which have been made in the State of California?

A. Yes.

Q. Over the last eight or nine years?

A. Yes.

Q. Are you familiar with the conditions in the market on wines?

A. At the present time?

A. Yes.

Q. Were you familiar with those conditions in January of 1943?

A. Yes.

Q. And throughout the year 1943?

A. Yes.

Q. Did you know about the market conditions in the fall of 1942?

A. Yes.

Q. Would you state what was happening about that time?

A. Well, at that particular time, due to conditions in Europe, there was a shortage in this country, and the market tended to rise, and there still is a shortage of California wines in the State today.

Q. What effect did that have on the price of wines in general?

A. The wines started to increase in price."

No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individ-
ually and as Copartners doing business as
P & J CELLARS (a Copartnership),

Appellants,

VS.

PARK, BENZIGER & Co., INC. (a Corporation),

Appellee,

and

PARK, BENZIGER & Co., INC. (a Corporation),

Cross-Appellant,

VS.

PIERRE BERCUT and JEAN BERCUT, Individ-
ually and as Copartners doing business as
P & J CELLARS (a Copartnership),

Cross-Appellees.

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FILED

JAN 15 1945

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ually and as Copartners doing business as
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Cross-Appellees.

REPLY BRIEF FOR APPELLANTS.

May it please the Court:

At appellee's page 3 we are loosely charged with "irresponsible misstatements", set forth in their Appendix A. Our reply in our Appendix A hereto demonstrates that there is neither irresponsibility nor misstatement.

The "impression" at their page 3 about "inexperienced innocents" misses the point of the evidence, which was simply offered to show that the sellers were not wine merchants, but simply in the course of other activities entered fortuitously into the wine storage transaction detailed at our Opening pages 10 and 11, in an effort to make use of some idle space in a cold storage warehouse.

We follow the sequence of appellee's brief in our reply to it:

Appellee's pages 4 to 12: We agree that the case falls under Calif. Civil Code § 1787, and in our Opening we argued from that premise. We agree that it does not come under subsection (3) and that it does come under (2), because there was not "an available market". However, that true premise is broadened by appellee at its pages 6 and 7 into a false premise by crossing over into the market unavailability basic to subsection (2) the "special circumstances" connected expressly and solely with market availability under subsection (3); and then appellee's cross-over is made pregnant with worse confusion on the way over by the innuendo at their page 6 that the "special circumstances" connected with market availability under (3) means "loss of profits upon a specific resale contract". That innuendo is utterly without any support in the law. Appellee cites no case, and we believe that none can be cited, in support of the proposition that when the goods are available in the market the buyer may nevertheless

collect loss of expected profits on resale. He may not; the proper measure in a case of availability is the excess of market price over contract price, "because the purchaser having the money in his hands may go into the market and buy", *Williston, Sales*, § 599; 46 *Am. Jur.* 803. The "special circumstances" stated in subsection (3) have the meaning illustrated in the following passage in *Williston, Sales*, § 599:

"It may be that no market exists at the place where delivery was due. The nearest available market furnishes the basis under such circumstances; the expense of obtaining and transporting the goods from that market to the place where delivery is due being added. It will not infrequently happen that goods have no market value or none which can be determined with any exactness. Wherever goods are of a special kind or are of a peculiarly good or bad grade or quality, this is likely to occur. In such a case the court must determine the value of the goods as best it can by considering the expense to the buyer of securing similar goods, or goods which would equally well serve the purpose."

Loss of expected profits, i.e., gain prevented, because of unavailability of the goods elsewhere in the market must, under subsection (2), be shown to be a "loss directly and *naturally** resulting in the ordinary course of events, from the seller's breach of contract", and it is not such a loss if at the time the contract was entered into the seller did not know that other goods of the kind contracted for could not be obtained by the buyer. There is no conflict, contradiction or inconsistency between the authorities cited in our

*The term "naturally" comes from the text of Baron Alderson's statement in *Hadley v. Baxendale*, where he defined it as meaning "according to the usual course of things". And see *Williston, Contracts*, § 1356.

Opening pages 39 to 53 and the cases cited by appellee, for in none of the latter was the question at bar discussed, and not one of them cites or discusses the Sales Act. On the contrary, *Marcus & Co. v. K. L. G. Baking Co.*, 3 Atl. 2d 627, decided nineteen years after appellee's principal case of *Orester v. Dayton Rubber Mfg. Co.*, 126 N.E. 510, cites and fully discusses the Sales Act.

Pages 12 and 13: We are charged with miscopying *Williston, Contracts*, § 1347. We did *not* miscopy. At our Opening page 47 we said that "in that section Williston said, 'When a defendant has been notified,' " etc. That is exactly what Williston said, and our quotation of him is a true one. The revised edition of his *Contracts* was written by Thompson who changed the words to, "When a defendant has reason to know", etc. Under either text our motion for a directed verdict was good. Appellee simply makes a loose and unfounded charge of misquotation in an effort to bolster a bad argument, the argument being bad because it in turn is a loose and unfounded assertion, at their page 12, that "the defendants had reason to know of the condition of the wine market". The relevant time of knowledge is the day, January 29, 1943, when the contract was entered into, and the evidence spread at our Opening pages 10 and 11 is positive, clear, uncontradicted, and credible, that at that time the Bercuts were ignorant of the fact that if they therefore breached the contract other wine would not be obtainable in the market. The testimony is clear, and the astute trial counsel of appellee carefully refrained from cross-examining either of the Bercuts about it, no doubt because his witness Hermann had already admitted on cross-examination that when the contract was entered into he, Hermann, knew that the Bercuts were novices in the wine business. (See our Opening page 9.)

To sustain a verdict, appellee should have destroyed our evidence by cross-examination or opposing evidence, rather than by loose words in a lawyer's brief. Their present loose talk does not create an opposing presumption against the evidence, and even if it did the presumption would fall before the uncontradicted testimony of even a party to the cause, *Ariasi v. Orient Ins. Co.*, 9 Cir., 50 F. 2d 548, where it is laid down that "in the absence of all contradictory evidence and any inherent improbability in the testimony, the Court cannot arbitrarily reject the testimony of a witness whose testimony appears credible". (50 F. 2d at 551, col. 2.) Appellee's sole citation is to *Spore v. Washington*, 96 Cal. App. 345, 274 Pac. 407, which was a suit for damages for personal injuries arising from a defect in the premises of a building against a defendant who breached a duty to inspect for defects, a field utterly foreign to the present issue before the Court. Where, in the law of Sales, can one find a ruling that a seller is under a *duty to investigate* availability of the goods elsewhere at some future date, before entering into a contract of sale?

Pages 14, 15 and 16: Appellee cites as the "Governing Law" the two local cases of *Natural Soda Products Co. v. Los Angeles*, 23 Cal. 2d 193, and *Hacker Pipe & Supply Co. v. Chapman Valve Mfg. Co.*, 17 Cal. App. 2d 265. Very well, let the Law of those cases Govern the one at bar. It is laid down in the latter, 17 Cal. App. 2d at 267, that the *requirement* of the law is "that the best evidence be adduced of which the nature of the case is capable". In both of the cited cases the plaintiffs carefully accepted and met that test. In the *Hacker* case the plaintiff jobber proved the actual sales made by itself during the life of the contract, and its actual profit experience thereunder, and applied that profit experience as a proved test of the

additional profit it would have made in its established business upon the additional volume sold during the same period of time in its exclusive territory by defendant in violation of the exclusive right of the plaintiff. Similarly, in the *Natural Soda Products Company* case, the plaintiff had operated its first or older plant for five years before the tort flooded the second or new plant for processing the identical natural chemical compound; and the plaintiff accepted and met the requirement that lost profits be proved by the *best* evidence, by proving (23 Cal. 2d at 199-200): actual sales in the two years preceding the tort; that prices were stable; unit costs based upon "detailed figures concerning actual expenses, such as labor, depreciation, insurance, taxes, and royalties"; and proved capacity of plant.

Those two cases are *against* appellee; they strongly support the defense motion for a directed verdict. At bar, appellee offered only the poorest evidence, not the best.

Pages 16 to 19: Appellee's assertion that all our citations are "bad law" is based upon the assumption that a revolution was worked in California law by the *Natural Soda Products Company* case, *supra*, which simply held that the particular evidence was satisfactory and sufficient. The assumption of revolutionary law is unfounded. The case lays down no new law and is perfectly consistent with the California cases cited in our Opening. The cases in which an award has been sustained are those wherein the proof (1) has been based upon profit *experience* of the particular claimant, thus providing a satisfactory basis of reasonable estimate, and (2) the evidence of that experience has been the *best* evidence of which the case permits.

The required *experience* is an "operating experience sufficient to permit a reasonable estimate of probable in-

come and expense'', *Natural Soda Products Co.* case, 23 Cal. 2d at 199, which is of course lacking in the case of a new enterprise or business not yet launched, i.e., there are no provable data furnished by actual operating experience; and the requisite operating experience is equally lacking if an established business adds a new or unestablished line of goods, *Thrift Wholesale Inc. v. Malkinillion Corp.*, 50 F. Supp. 998, at 1000, col. 2.

The requirement of the *best* evidence of provable data based on experience is not met by the loose percentage estimate of the interested Elman: "Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way'', *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 102.

Pages 19 to 23: Appellee says at his page 20 that four named witnesses testified to facts that proved that all of the tens of thousands of cases of wine could have been sold at the "list prices". There is not a scintilla of evidence that so much as one case of wine was ever sold at those prices; and those witnesses merely testified in substance to a strong demand and a rising market. After the publication of the list, and separately from the contract sued upon, appellee bought at least 2500 cases of other California wine from appellant (R. 88), but made no proof, detailed or otherwise, of its resale prices or selling expense or profit experience, although the evidence must have been readily available in its books of account, nor any proof of experience with the eight or nine or ten thousand cases of California wine (see our Opening pages 24 and 25) obtained from others in California in 1942, the very period as to which their witnesses testified to a strong market. See the ninth ground of our motion for a directed verdict, R. 467, that appellee "instead of turning to better evi-

dence has used worse or poor evidence by way of opinion or estimate or guesswork''. Whether rising, stable or falling market, appellee had better evidence, the best evidence, hidden away unused in its books of account, covering its own transactions in California wine to the extent of thousands of cases during the market period in question.

At its page 22 appellee seeks to avoid the requirement of the established rule that any award for gain prevented must be based upon provable data furnished by *experience* by arguing, in effect, that it was 'a business house that throughout all previous years was inexperienced in commodity shortages; it says that "plaintiff's past profits were before the shortage''. There is not a scintilla of evidence in the record as to what profits appellee ever made in any year or at any time, but the proof is confined to the loose, vague and general statement about a single item that its wine sales manager called "overhead''. The truth is that what appellee is seeking in that argument at page 22 to do is to attempt to sustain an award based on the highly inflated prices stated in its posted lists for the months of March and April, 1943, and without regard to the effort that has been made by the Congress and the price agency created by it to stop or control inflation and place a limit or *ceiling* on permitted prices. In the last analysis that argument on page 22 is simply an effort by circumlocution to ignore, and to invite this Court to ignore, the O.P.A. ceiling.

Pages 23 to 27: Appellee fails to point to any evidence as to cost of washing and polishing the bottles. And there is no basis for the naked assumption at their page 26 that "the cost of printing labels was part of the regular overhead''. Labels are part of the production of the container of packaged goods, and their cost is a production cost.

Similarly, interest, "the cost of capital", is never included in "overhead". Overhead "may be said to include broadly the continuous expenses of a business, irrespective of the outlay on particular contracts", 46 *C.J.* 1161.

Pages 29 and 30: The curious argument is made, "O.P.A. Limitation Outside of Issues Because Not Pleaded". The mention of "illegality" in Rule 8(c) FRCP relates to illegality in the contract sued upon in the "preceding pleading", not to an illegal excess in the amount of prevented gain attempted to be proved by a plaintiff for breach of a legal contract. *Shelley v. Hart*, 112 Cal. App. 231, 242-243, 297 Pac. 82, 87.

Pages 30 to 38: In these pages the appellee deliberately attempts to confuse and mislead. The trial theory was this: the appellee was suing upon an alleged repudiation occurring on April 27, 1943, and attempted to make proof of *market value* subsequent to that date. Market value was relevant only if there was a market, i.e., if the wine was available elsewhere; and there was none available. Even if available in the market, then under California law the inquiry into market value would be confined to the day, April 27, 1943. (See Defense Request No. 22, R. 50 and 51, and comment at R. 493.) Appellee's attempt to prove market value took the form of an attempt to prove the prices at which appellant subsequently sold the wine to others over a period of months. The portions of the record, R. 255-261, quoted at appellee's pages 31, 32 and 33, occurred in the course of appellee's attempt to lay damages on the excess of market value over the contract price, notwithstanding there was no available market. Thereafter, at R. 297, appellee recalled Elman as a witness and changed its own trial theory from R. 298 onward. Under appellee's changed theory appellants made no attempt to

confine proof to the day, April 27, 1943, because appellee's new theory went for loss of profits, i.e., gain prevented *after* April 27, 1943, through the life of the contract. Under that changed trial theory of appellee, any matter that had occurred before April 27, 1943, or that thereafter occurred up to the time of the trial, that would furnish provable data of profit experience or that would have a relevant bearing thereon, would be admissible; and at no time during the trial did we ever object to the offer of such data, nor indeed would it ever have occurred to us to have made an objection to such an offer, in view of the well known rule long established in California in the leading case of *Shoemaker v. Acker*, 116 Cal. 239, where at 247 the rule was stated as follows:

“This rendered the offered evidence more valuable; for in an action upon a contract which contemplates a long period of time for performance, if the trial be delayed, the conditions existing at the time of the trial, as affecting the prospective profits, may be shown. In such a case ‘parties are entitled to the benefit of any facts transpiring subsequently to the bringing of the action which show more clearly the gains prevented by the breach complained of, or the damages sustained from such a cause of action, or any other, the injurious effects of which extended into the future.’ (Sutherland on Damages, sec. 107. See also, *Tahoe Ice Co. v. Union Ice Co.* [109 Cal. 242], *supra*.)”

Pages 40 to 42: To understand appellee's argument about Price Regulations, a brief statement is needed. The first of the price regulations during the present war became effective on May 11, 1942, and was known as the General Maximum Price Regulation (GMPR). It used the base-period method of pricing, and the base-period used was March, 1942. In § 1499.2 maximum prices were stated as follows:

“§ 1499.2. *Maximum prices for commodities and services; general provisions.* Except as otherwise provided in this regulation, the ‘seller’s’ maximum price for any commodity or service shall be:

(a) The highest price charged by the seller during March, 1942:

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) If the seller’s maximum price cannot be determined under paragraph (a), the highest price charged during March, 1942, by the ‘most closely competitive seller of the same class’:

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.”

It was stated at page 33 of the Fourth Quarterly Report of the Office of Price Administration, for the period ended January 31, 1943, that:

“When the General Maximum Price Regulation was issued in May, 1942, fixing the prices of thousands of commodities at the highest price charged by the seller during the previous March, it was realized that this method of a general price freeze could hardly provide a permanent solution to the problem of controlling all the items covered by the regulation. It was found necessary to move many commodities out of the GMPR as rapidly as possible.”

On August 9, 1943, brewery, distillery and winery products were moved out of the GMPR by MPR 445, effective August 14, 1943. In that movement of those products from

the one regulation to the other, the technique of price control of those commodities was changed from the base-period technique to the cost-plus pricing technique. In our Opening pages 67 and 68 we give detailed reference to the contents of MPR 445, showing that it imposed a ceiling markup of 25% over defined net cost, and that that ceiling applied to appellee as a "wholesaler" as defined in MPR 445, being a person engaged in the business of buying and selling wine, without changing the form thereof, to persons other than consumers. The "definitions" in MPR 445 are contained in § 7.12 thereof, and the definition of a "processor" is therein given as follows:

" 'Processor' means any person who:

(i) Produces or blends distilled spirits or wine, including (but not limited to) a distiller, rectifier or vintner; or who

(ii) Bottles under any brand name distilled spirits or wine belonging to him, or who

(iii) Causes distilled spirits or wine to be bottled or blended for his account under his own brand name."

The definition of "wholesaler" is therein given as follows:

" 'Wholesaler' means any person (except a monopoly state or primary distributing agent) engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers."

In our Opening we asserted that appellee is a wholesaler. At its pages 40 to 42 appellee asserts that it is a processor. If a wholesaler, it came under MPR 445. If a processor, it was excluded under § 4.1, i.e., processors were left under the GMPR.

Contrasting the foregoing definitions of “processor” and “wholesaler” it will be seen that the test is, Did appellee change the form of the wine? With respect to the 60,000 cases mentioned in the contract we are not concerned with the 33,309 cases not yet bottled or in existence, but are concerned only with the 26,691 cases *already bottled*, because it was only the latter wine that was submitted to the jury as a basis for their verdict. As to the 26,691 cases, appellee did not change the form thereof from bulk to bottled wine, because it had already been in bottled form for some years when the contract was entered into in January, 1943. Appellee did not produce or blend the wine, because it had already been produced, blended and bottled for some years. Appellee did not bottle “under any brand name distilled spirits or wine belonging to him”, because the bottling had been completed some years before the contract was entered into in January, 1943, at a time when the wine not only did not belong to appellee, but appellee was even ignorant of its existence. Nor did appellee cause “wine to be bottled or blended for his account under his own brand name”, because the wine had been bottled and blended by appellants for their own account years before they ever heard of the existence of appellee. At its page 41 appellee premises its argument with the innuendo that bottling and labeling are identical. It is self-evident that bottling wine is one thing, labeling it is another. It is not to be supposed that a wine wholesaler can at his own caprice take himself out from under MPR 445 merely by using a rubber stamp or a print shop upon the exterior of bottles of wine, produced, blended and bottled by someone else for the latter’s account, but that is all that appellee’s label argument amounts to.

Pages 42 to 44: Appellee argues that under § 5.10 of MPR 445 it could sell and continue to sell wine at the prices stated in the wholesale and retail price lists posted with the New York State Liquor Authority, Plaintiff's Exhibits 14 and 15, R. 308-311 and R. 316-318. MPR 445 § 5.10 reads as follows:

“Dates on which This Article [Article V—Maximum Prices for Sales of Packaged Distilled Spirits and Packaged Wine by Wholesalers, Retailers, Monopoly States and Primary Distributing Agents] shall apply. This Article, except as otherwise provided, shall apply to all sales or offers to sell of packaged imported or domestic distilled spirits or wine made by a wholesaler, retailer, monopoly state, or primarily distributing agent on and after August 31, 1943; Provided, That this Article shall not apply to any sale which a wholesaler, retailer or primary distributing agent is required by statute, ordinance, or regulation to make at a price posted or listed prior to August 14, 1943, with a state or other public authority (if the price so posted or listed is greater or less than that established by this Article for such sale) until on and after the first effective date for prices so posted and listed at the first opportunity after August 19, 1943.”

Under that exclusion of list prices under a required sale pursuant to a listing, it is self-evident that it relates only to a list that was in effect on August 14, 1943. Neither Exhibit 14, Schedule of Wine Prices to Retailers, nor Exhibit 15, Schedule of Wine Prices to Wholesalers, was in effect on August 14, 1943, nor was either one of them in effect subsequently to the month of May, 1943. Each of the exhibits states at the beginning that it was filed in New York, “pursuant to § 101-B of the Alcoholic Beverage Control Law”. We reprint that New York statute here as Appendix B and the merest of glances at

the text of it will at once demonstrate (1) that the purpose of it is simply to prohibit liquor dealers from price discrimination between customers by favoring one and disfavoring another through the medium of rebates, discounts and the like, and (2) each list thus filed or posted had an effective life of only one month, i.e., had to be filed or posted once a month. The retail list, Exhibit 14, R. 308, is headed, "Effective for the Month of March, 1943", and at the foot of R. 309 is corrected to read "Month of April, 1943". That list was therefore no longer in effect after the month of April, 1943. The wholesale list, Exhibit 15, R. 316, is headed, "Effective for the Month of May, 1943", and at the foot of R. 317 reads, "This Schedule of Prices to Wholesalers for Month of May, 1943". Elman admitted on his cross-examination that a new list had to be made up "on that kind of a form" each month, R. 324, and that the Bercut wines were "deleted" from the lists filed by appellee subsequent to the month of May, R. 325.

It is clearly obvious that appellee does not escape the 25% markup ceiling by the proviso in § 5.10 of MPR 445. Even if appellee had posted or listed a price effective in August, 1943, it would not escape the ceiling of MPR 445 for all time, but the proviso of § 5.10 would merely have enabled it to complete the month of August, 1943, until the life of the list had ended.

Pages 44 and 45: Appellee says that MPR 445 "obviously did not affect sales made before its enactment". The short answer is that appellee made no sales before August 14, 1943, with the possible exception of one minimum carload of 1200 cases and even as to that sale the record does not show the terms or price of sale. The case was not submitted to the jury on the theory that appellee now attempts to put forward. The whole theory of appellee's

case in the form in which it went to the jury was a theory of spot sales from month to month at wholesale and retail in the ordinary course of business and it was on that theory that it asked that its gain prevented be calculated, and it was upon that theory that the jury calculated the amount of the verdict under attack. Appellee at its page 44 seeks to piece out a bad argument by the statement that "the damages in the present case" were "taken as fixed on April 27, 1943". That is an untrue and misleading statement. For the purpose of calculating damages, the date of April 27, 1943, was material during the trial only during the course of appellee's attempt to prove an excess of market value over the contract price. After the Court below ruled out market value, appellee changed its damage theory to one of lost profits, R. 298 (Elman recalled), and from that point on, the date of April 27, 1943, lost the significance it had theretofore had during the trial.

Pages 45 and 46: These pages are merely a repetitive form of a preceding argument.

Pages 46-49: If there be any merit in the contention that our request was bad because oral, it is a contention that should have been made to the Court below. If a trial Court is willing to accept an oral request, and does not reject it because it is oral, that should be the end of the matter. However, the request could only be oral because it related to a matter that sprang up from within the jury after it had retired. Moreover, the jury were not asking for a further instruction but simply sent a note to the judge saying, "Please get us copy of OPA price regulation on retail and wholesale prices effective sometime during August, 1943", R. 526. The jury were asking for a paper, a document; they were seeking to learn a fact, i.e., What was the price ceiling effective in August, 1943? It so

happened that the “price regulation” of which they asked for a copy was something that under the law was within the judicial knowledge of the trial Court and the request was merely, in substance, that the trial Court tell the jury what it judicially knew, i.e., that the ceiling was a markup of 25%. The suggestion at appellee’s page 49 that the response by the Court below to the jury request took the form of sending in to them a copy of the reporter’s transcript of the evidence and that that was done by stipulations, is misleading, because our side of the stipulation simply stipulated that we had no objection to the jury reading the evidence that they had already heard but that we coupled our willingness with a request that the Court send its judicial knowledge of a ceiling of 25% to the jury along with the transcript.

Pages 49 and 50: Appellee seeks to overcome the *Guetzkow* case by a reference to *Edwards Mfg. Co. v. Bradford*, 294 Fed. 176, 182, 185. The latter case favors us, because it rules, at page 184, that what is a reasonable or unreasonable profit is “a question of law”, which is exactly what we contend; and it held that in a sale at 10¢, a profit of 1¢ on 9¢ or less than 12%, was as a matter of law not an unreasonable profit. From the facts it appeared that on September 6, 1917, the plaintiff took a short position by contracting to sell 300 tons of sheet steel at 10¢ a pound for future delivery. (294 Fed. at 177.) At the time of the short sale the market price of the steel was 9¢ per pound. On November 5th, almost a month later, the United States Government fixed the price of this steel at 6¢ per pound. The purchase by the plaintiff from the defendant was made November 22nd at the ceiling price of 6¢ per pound. The argument was that under the *Guetzkow* case the profit should be calculated as an ordinary one based

upon a cost of 6¢ and a sale at 10¢. The ruling of the Court was that 3¢ was attributable to the hazard plaintiff had taken in taking the short position and that the true method of applying the *Guetzkow* case was to treat the profit as 1¢ on 9¢ or less than 12%, which was reasonable as a question of *law*.

Pages 51 to 53: Appellee argues that the language, “the buyer must make proof” appearing in Defense Request No. 31, given at R. 521, is equivalent to an instruction to the jury that the burden of proof was on the plaintiff. The instruction goes no further than to indicate that the buyer must introduce some evidence, but it is utterly silent upon the question of burden of proof. At its page 53 appellee makes a misstatement that we did not request an instruction on the burden of proof “until the day after all the requests had been discussed” and therefore the request was too late. The session of the Court below at which the instructions were settled was held on March 20, R. 470. The Court announced that it would “now take up the matter of instructions under Rule 51” FRCP. It stated: “I am giving defendants’ Request No. 36”, R. 477. Overnight, there was a change of mind and on March 21, R. 505, the Court made the following announcements in the course of the following colloquy, R. 505-506:

“The Court. Referring to the defense request No. 36, yesterday I stated that I expected to give that instruction. I now advise counsel that I will give the instruction, but I shall delete therefrom the following: ‘And the burden of proof is on the plaintiff.’ That is the last clause or phrase in the instruction. You may have an exception to that, Mr. Naus, of course.

Mr. Naus. No, I don’t think so, your Honor, because I take it in your stock instruction you will deal

with the burden of proof, so I take no exception to that deletion.

The Court. Very well.”

On the previous day, near the beginning of the settlement of instructions the Court had stated, R. 472:

“These instructions will be followed by what I call our stock instructions. Those instructions are the instructions usually given by the court in civil cases with which both sides are familiar.”

It is self-evident that an instruction upon the burden of proof is one of “the instructions usually given by the court in civil cases with which both sides are familiar” and hence when on the following day we announced that we would take no exception to the deletion from our Request No. 36 of the matter relating to the burden of proof, because we understood that the Court would cover that by its “stock instruction”, we received the assent of the Court below.

Page 54: Appellee argues with respect to the failure to instruct on the burden of proof that we “took no exception”. Rule 46 FRCP rules that it was sufficient for us to have made known to the Court the action that we wished the Court to take on the matter of instructing on the burden of proof. We made it clear that we wanted an instruction on it and the Court gave no instruction on it.

Pages 54 to 56: Appellee confuses two utterly different things: (1) the determination of “net profit” from the standpoint of Hermann as a claimant against appellee, as a basis of amount on which to calculate *his* 50%, and (2) the determination of *appellee's* net profit after appellee had paid its salesman-employee Hermann. This is not a suit by Hermann against appellee; it is a suit by appellee

against appellants, a suit for appellee's gain prevented. To determine that gain, one must look at what appellee would retain or have left if it had paid out a royalty or selling commission of 50%. The case of *Russ v. Tuttle*, 158 Cal. 226, cited at appellee's page 55, does not meet the point. It was not a suit for gain prevented, i.e., not a suit for lost profits. It was simply a suit for damages in the form of excess of market value over contract price, in which one of the joint owners of the contract had not been named as a co-plaintiff and hence there was a defect of parties plaintiff, which might have been reached by demurrer or answer, but as to which no objection was taken in the pleading. At bar, appellee claims as an assignee of the whole contract with appellants, and Hermann becomes merely an employe or salesman of the assignee. The five cases cited at appellee's page 56 at the foot of its argument heading VI, are simply cases of an employee suing an employer for a percentage of net profits and obviously in that context, the term "net profits" would be used as meaning before deduction of the percentage. However, at bar the suit is not one by an employe to be awarded a percentage of net profits but the question here is simply, What gain would be retained by or left to appellee, the employer, after deducting the 50% selling commission payable to the salesman?

Pages 56 and 57: They make the unsupported statement that the principle of Defense Request No. 37 (our Opening Brief pages 74 to 77) "does not exist in the law of sales". The "law of sales" is part of the "law of contracts". The "principle" in question is part of the "law of claims of lost profits". In the great multitude of suits for damages for breach of a contract of sale the damages are not measured by profits, measurement by the latter

being a rare exception; and a transaction like the one at bar, wherein both buyer and seller were engaging in something new, is far more rare. Paucity of particular precedent is therefore not surprising. However, the principle is clear and established, with the line of cases led by the Supreme Court of the United States. In 17 *C.J.*, Damages, § 199, and 25 *C.J.S.*, Damages, § 90, the principle is presented as a broad one extending throughout the fields of contract and tort whenever *profits* are claimed by a plaintiff; and in the absence of any local decision the diversity case at bar is ruled by *United States v. Speed*, 8 Wall. (75 U.S.) 77, last two paragraphs. The suggestion at appellee's page 57 that wine prices have not fallen since the expulsion of Germans from Italy and France is false; there has been a heavy fall.

Pages 57 to 59: The vice of the instruction given, their No. 10, is that it assumes that an inability to pay cannot exist unless the plaintiff was "actually insolvent". They assume that if plaintiff had a net worth of, say, one dollar and hence solvent though barely so, *aside* from the wine contract, ergo they had an ability to perform the wine contract independently of the credit obtainable through receipt of the wine or the shipping documents covering it, contrary to Williston's section 881. A plaintiff does not show a readiness and ability to perform by showing the credit he would obtain through performance by the defendant; his ability must be independent, *Brown v. Lee*, 5 Cir., 192 Fed. 817, 821, bottom. To that the Court cited *inter alia Gray v. Smith*, 76 Fed. 525, 534, which states, "But efficient ability is back of, and is essential to, the obligations of the parties, and must actually exist in each independent of the other".

It was incumbent on plaintiff to show ability to perform; "Neither party to a contract can maintain an action for damages for its violation without showing a readiness and ability to comply with his own engagements under the contract", 17 *C.J.S.* 1232, 13 *C.J.* 764. At its page 58 appellee seeks to evade its burden by saying that "Defendants raised the supposed inability of the buyer (Fourth Defense, R. 24)". No one but defendants could *raise* it, because issues are not "raised" until answer; but appellee's innuendo of an affirmative *defense* is false, because the failure of the complaint to allege readiness and ability was a fatal defect, and the "fourth defense" was not a confession and avoidance but was simply a pleading *aider* through an affirmative *traverse* of a missing essential allegation of the complaint. The issue was appellee's ability to perform, and it failed to show ability.

The reference at their page 58 to Calif. Civil Code § 1511 is incomprehensible. The issue is not one of excuse for nonperformance, but of a missing element in a contract claimant's claim.

Dated, San Francisco,
January 15, 1945.

Respectfully submitted,

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(Appendices A and B Follow.)

Appendices A and B.

Appendices

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Appendix A

REPLY TO APPELLEE'S APPENDIX A.

We reply in the sequence of the Roman paging of their Appendix.

(i-ii). They quibble. "Chateau Montelena of California" was a name used by Feldheym, R. 186 and 187. "Chateau Montelena of New York" was a name used by the wife of Hermann, R. 187. In the questions and answers at R. 186 and 187 it is clear that the witness Hermann, in stating the extent of buying of wine by himself and wife prior to the deal with appellants, gave as the only transaction one carload bought from Feldheym (Chateau Montelena of California) by the Hermanns (Chateau Montelena of New York).

(iii). Appellee challenges our statement, "There is no evidence that any orders were taken or sales made under either *list*". They quote from R. 298 Elman's testimony on direct examination about a commitment or order for 1200 cases of wine. However, on cross-examination, it developed that the customer was located in Washington, D. C., not in New York, R. 330, and the witness Elman admitted that he did not "recall" whether that verbal commitment, R. 330, to the Washington customer was before or after the posting or filing or publishing of the wholesale list in New York, R. 332. We therefore repeat: There is no evidence that any orders were taken or sales made under either list.

(iv). We still say that Elman was not an accountant or auditor and that he did not produce any accounts or books.

It follows that his testimony about "six per cent" is necessarily an assumption.

(vii). The references to the witnesses Cholet, Lusinchi and Elman, as to "the state of the wine market" add nothing.

(vii), proof of cost of labels. Appellee treats cost of labels as part of "selling expense" included in sales overhead of six per cent. The cost of labels, however, is obviously a part of the cost of packaged merchandise, not a sales overhead.

(viii). What difference does it make at what time of the year Finlay, Holt & Company milked its subsidiary Park, Benziger & Co.? If it was "at the end of each year", then it is obvious that the preceding year had ended less than a month before the contract was made on January 29, 1943.

Appendix B

NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW, § 101-b.

Section 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund.

1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. It shall be unlawful for any person privileged to sell liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality. (b) to grant, directly or

indirectly, any discount, rebate, free goods, allowance or other inducement, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold within the state to a wholesaler or retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect.

(b) The schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the bottle and case price to wholesalers, the bottle and case price to retailers, the number of bottles contained in each case, which prices shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any.

(c) The schedule containing the bottle and case price to wholesalers shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

(d) The schedule containing the bottle and case price to retailers shall be filed by each manufacturer and wholesaler who sells brands of liquors or wines to retailers.

(e) Provided however, nothing contained in this section shall require any manufacturer or wholesaler to list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state by such retailer.

4. Each such schedule shall be filed on or before the tenth day of each month on a date to be fixed by the authority, and the prices and discounts therein set forth shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. Within ten days after the filing of such schedule the authority shall make them or a composite thereof available for inspection by licenses by filing copies with each local board. Within three business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. No brand of liquor or wine shall be sold except at the price then in effect unless written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. All schedules filed shall be subject to public inspection, from the time that they are required to be made available for inspection

by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by licensees a copy of his filed schedules as then in effect. The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section.

5. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, on or before the tenth day after this act becomes a law, there shall be paid to the liquor authority by each manufacturer and wholesaler licensed under this chapter to sell to retailers liquors and/or wines, a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for each such licensee. A like sum shall be paid by each person hereafter applying for any such license or the renewal of any such license, and such sum shall accompany the application and the license fee prescribed by this chapter for such license or renewal as the case may be. In the event that any other law requires the payment of a fee by any such licensee or applicant as set forth in this section for schedule listing, then and in such event the total fee imposed by this section and such other law or laws on each such licensee shall not exceed in the aggregate a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for such license. Added L. 1942, c. 899, Sec. 1.

See McKinney's Consolidated Laws of New York Annotated—Book 3—1944—Cumulative Pocket Part—Page 39.

No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUt and JEAN BERCUt, Individ-
ually, and as Copartners doing business
as P & J Cellars (a copartnership),
Appellants,

VS.

PARK, BENZIGER & Co., INC. (a corporation),
Appellee,
and

PARK, BENZIGER & Co., INC. (a corporation),
Cross-Appellant,

VS.

PIERRE BERCUt and JEAN BERCUt, Individ-
ually, and as Copartners doing business
as P & J Cellars (a copartnership),
Cross-Appellees.

CROSS-APPELLANT'S OPENING BRIEF.

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No. 10,823

IN THE

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For the Ninth Circuit

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ually, and as Copartners doing business
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Appellants,

vs.

PARK, BENZIGER & Co., INC. (a corporation),

Appellee,

and

PARK, BENZIGER & Co., INC. (a corporation),

Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individ-
ually, and as Copartners doing business
as P & J Cellars (a copartnership),

Cross-Appellees.

CROSS-APPELLANT'S OPENING BRIEF.

INTRODUCTION.

This is an action by the buyer (plaintiff-appellee-cross-appellant) for breach of a contract to sell wine. The contract appears at R. 76-82.

There have been two trials of the case. On the first trial, the jury returned a verdict for \$91,500, and the District Judge granted a new trial. The second jury brought in a verdict for \$72,687.50, on which judgment was entered. Defendants appealed from this judgment.

Plaintiff is satisfied with the verdict although it is somewhat smaller than the first verdict. *Plaintiff's cross-appeal is taken only to protect itself in the event of a third trial.* (R. 549.) Since the court followed the defendants' theory of law on the second trial and almost all intermediate rulings were in defendants' favor, there seems to be no reason whatever for setting the verdict aside. *In the event of an affirmance on defendants' appeal, plaintiff desires the cross-appeal to be dismissed.*

The cross-appeal virtually covers the points which plaintiff would make on an appeal from the order granting a new trial, were such an appeal possible. In other words, the first trial was tried on the plaintiff's construction of the contract and on plaintiff's theory of evidence. The trial court changed its mind about this, granted a new trial and tried the second trial upon the defendants' theory of law. While even that resulted in a plaintiff's verdict, which we believe should unquestionably be affirmed, plaintiff out of an abundance of caution has cross-appealed so that if by any chance there should be a third trial plaintiff will be permitted to present it (like the first trial) upon plaintiff's rather than defendants' legal theory.

STATEMENT OF JURISDICTION.

This case was tried in the United States District Court for the Northern District of California, Southern Division. Federal jurisdiction rests on diversity of citizenship. Plaintiff is a New York corporation (amended complaint Par. II, R. 10); plaintiff's assignor is a resident and citizen of New York. (Amended complaint Par. III, R. 10.) Defendants are residents of the City and County of San Francisco, State of California. (Amended complaint Par. IV, R. 10-11.)

The *ad damnum* clauses and prayers of both complaint and amended complaint are for more than \$3000 (R. 6, 7, 13, 14) as is the judgment. (R. 68.)

Jurisdiction of the trial court rests upon 28 U.S.C.A. 41(1); jurisdiction of the Circuit Court of Appeals upon 28 U.S.C.A. 225(a). See also Rules 74, 75(k) of Federal Rules of Procedure.

STATEMENT OF THE CASE.

On January 29, 1943, defendants and plaintiff's assignor (Serge Hermann) entered into a contract by which defendants were to sell and deliver 60,000 cases of wine to Hermann. (R. 76-82.) The contract was modified by letter on February 3, 1943, defendants making certain additional representations (R. 21, 82-3), and was assigned to the plaintiff on February 25, 1943. (R. 83.) The original contract was drafted by one W. G. Evans (R. 171), an agent and employee of the defendants. (R. 374.) The second and third paragraphs of the contract provided as follows:

“Second: The party of the second part hereby agrees to take delivery of said wine at the rate of one carload each and every consecutive month hereafter for the next three years, the first carload to be taken during the month of February 1943 and continue thereafter as stated up to the year 1945, with the understanding, however, that should the party of the second part desire additional quantities for the holidays a maximum of two cars may be shipped in a particular month, provided ample notice of such intention is given to the party of the first part.

Third: The quantities now bottled and stored may be stated approximately as follows:

Burgundy	.....	7,167 cases of 12 bottles of fifths per case
Claret	.....	7,145 cases of 12 bottles of fifths per case
Rhine Wine	....	6,587 cases of 12 bottles of fifths per case
Sauterne	.....	4,095 cases of 12 bottles of fifths per case
Sherry	.....	834 cases of 12 bottles of fifths per case
Port	.....	863 cases of 12 bottles of fifths per case

and the price for this block of merchandise herewith mutually agreed upon to be paid to first party by second party shall be as hereby stated and subject to the terms and conditions herein stipulated. During the year 1943 dry wines will be billed on the basis of Five Dollars and twenty-five cents (\$5.25) per case and the sweet wines at Six Dollars (\$6.00) per case. Prices F.O.B. San Francisco, California. During the year 1944 payment shall be made on the basis of Five Dollars and fifty cents (\$5.50) per case for dry wines and Six Dollars and twenty-five cents (\$6.25) per case for sweet wines F.O.B. San Francisco, California.

It is agreed that shipment of the above mentioned quantities will be made first and before any other commitments, and that the balance of the

amount of the sale, which has not been bottled, is to be paid for proportionately as between dry wines and sweet wines the same, but subject to negotiations between the parties hereto whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945.”

Subdivision Eleventh of the contract expressly makes the contract bind assignees. (R. 81.)

On April 27, 1943, after partial performance by plaintiff and before deliveries commenced, the defendants committed an anticipatory breach of the contract by announcing that they would make no deliveries under it. (R. 120-122.)

First: At the first trial, the court submitted the issue of damages to the jury upon the basis of the total amount mentioned in the contract—60,000 cases. Upon the second trial, the court held the contract too indefinite as to everything except the quantities already bottled (listed in paragraph Third, R. 78), totalling 26,691 cases. So the issue of damages was submitted to the second jury on the basis of only 26,691 cases.

Second: At the first trial the court permitted plaintiff to introduce evidence upon two alternative theories of damages: (a) *loss of profits* if the jury should find the wines had no market value, and (b) prices obtained by defendants on sales to other cus-

tomers of the wines covered by the contract, as tending to establish market price of wine on one hand or actual value on the other. This evidence tends to fix the difference between the contract price and market price or between the contract price and actual value if the jury should find the wines either had or had not a market value.

On the second trial the plaintiff was limited to evidence of loss of profits. Evidence of the defendants' sales of the wines covered by the contract was excluded.

It is plaintiff's contention that the procedure of the first trial was correct in that:

(1) The jury should have been instructed to calculate damages on 60,000 cases;

(2) Plaintiff should have been permitted to prove the prices obtained by the Bercuts from other customers.

(In our appellee's brief on defendants' appeal, we shall show that inasmuch as the second trial was held upon *defendants'* theory, the judgment should be affirmed. If the judgment is affirmed, the cross-appeal need not be considered.)

I. THE ISSUE OF DAMAGES SHOULD HAVE BEEN SUBMITTED ON THE BASIS OF 60,000 CASES.

A. REFERENCE TO GROUND OF APPEAL.

Plaintiff's first ground of appeal presents the proposition that the issue of damages should have been submitted on the basis of 60,000 cases:

(R. 548-9) "1. Under a proper construction of the contract between the parties the court should have submitted the issue of damages to the jury on the basis of 60,000 cases instead of only 26,691 cases."

**B. INSTRUCTIONS AND REQUESTS FOR INSTRUCTIONS
RAISING THIS ISSUE.**

The issue whether damages should be calculated on 60,000 or on 26,691 cases was presented by plaintiff's requested instructions and by the instructions which the trial court refused and gave.

The charge of the court was as follows:

(R. 519-20) "Although the agreement dated January 29, 1943 purports to be for the sale of 60,000 cases of wine, a price is fixed for only 26,691 cases and the price for the remainder of 33,309 cases was left to be determined by future negotiations which never took place. Under such circumstances, the contract must be treated as and for the sale of only 26,691 cases. If you find that plaintiff is entitled to recover, you will ascertain the damages, if any, suffered by him on the basis of a contract for the sale of only 26,691 cases of wine."

This was defense request No. 38 (R. 63-4) to which plaintiff excepted at R. 489:

"The next one is 38. We except to that the same way that we except to the modification of our instruction No. 1 that reserved the earlier point."

Plaintiff's request No. 1 (R. 25) appears in the appendix of this brief. The court's modification is stated at R. 471:

“I shall give plaintiff’s instruction No. 1 striking out on lines 15 and 16 the words ‘to sell and deliver 60,000 cases of wine’.”

The exception of this modification is taken at R. 484-5:

“Mr. Olshausen. For the record, in the instructions given but modified, we except to the modification of instructions 1, 3, 11 and 15. That merely preserves the point on which the new trial was granted in the first place.

The Court. Yes.”

Other instructions given and refused, raising the same issue, together with plaintiff’s exceptions and the charge as given, are set forth in the appendix.

C. CONTRACT FIXED PRICE DEFINITELY, SO THAT DAMAGES SHOULD HAVE BEEN SUBMITTED ON 60,000 CASES.

26,691 cases were already bottled at the time the contract was executed. On these, the 1943 price was to be \$5.25 per case for dry and \$6.00 per case for sweet wines. The 1944 prices were 25 cents per case higher for each type of wine. (R. 78.)

As to unbottled wine the contract provides:

(R. 78-9) “The balance of the amount of the sale which has not been bottled is to be paid for proportionately as between dry wines and sweet wines the same, but subject to negotiations between the parties hereto *whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration*, and the prices governing the remainder of

the transaction *will be determined on the light of conditions existing during the year 1945.*" (Italics added.)

On the second trial, the court held that these provisions were so indefinite that they failed to fix a price for the unbottled wine. Accordingly it instructed the jury to disregard this part of the merchandise in fixing damages.

Under the authorities, the price for unbottled goods was definite enough. The issue of damages should have been submitted as to the entire lot. This conclusion rests upon three propositions of law:

(a) In case of doubt, a contract is to be construed so as to give it validity;

(b) Defendants drafted the contract and doubts must be resolved against the party who drafted the instrument;

(c) Price is fixed with sufficient definiteness where it is provided that a base price may be modified according to future market conditions.

Defendants claimed and the court charged (Def. request 38, *supra*) that price of the unbottled lot had been left *entirely* to future negotiations, and therefore no price had been fixed. Under rules of construction (a) and (b) above any ambiguities in the contract must be resolved to bring it within rule (c) above, rather than to make it void for uncertainty.

Specifically, the question is, which part of the contract should control? Should the words "but subject to negotiations between the parties" (R. 79) be read

without regard to the context? Or should they be read together with the clause "whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration, and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945"? Or in the event the two clauses are thought inconsistent, should the latter control as favoring the plaintiff and giving validity to the contract?

We now give the authorities supporting our three legal propositions:

1. Ambiguities in contract must be interpreted to give it validity.

The contract provides that questions of construction shall be governed by California law. (Clause Eleventh, R. 81.) A contract must be construed to give it validity rather than to make it void.

Civil Code 3541:

"An interpretation which gives effect is preferred to one which makes void."

Civil Code 1643:

"Interpretation in favor of contract. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

California decisions have uniformly followed the principles of these two sections. Compare:

Long Beach Drug Co. v. United Drug Co., 13 Cal. (2d) 158, 166 (applying these sections to the question whether a contract was definite enough to be valid) ;

Entremont v. Whitsell, 13 Cal. (2d) 290, 297 ;

Robbins v. Pac. Eastern Corp., 8 Cal. (2d) 241, 272-3.

See also

Civil Code, Sec. 1641 :

“a contract should be construed to give effect to all its parts.”

2. Ambiguities in contract must be resolved against party who drafted instrument.

Civil Code, Sec. 1654, provides in part :

“1654. *Words to be taken most strongly against whom.* In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”

This section states the familiar rule that ambiguities in a contract must be resolved against the party who drafted the instrument. California authorities upon this point are :

Weil v. California Bank, 219 Cal. 538, 541 ;

Cockrill v. Boas, 213 Cal. 490, 493 ;

Robert Marsh & Co., Inc. v. Tremper, 210 Cal. 572, 574 ;

Payne v. Neuval, 155 Cal. 46, 50.

3. Contract valid as one in which base price is varied according to future market fluctuation.

As already indicated, the defendants contended that the phrase "but subject to negotiations between the parties hereto" was exclusively controlling. From this they argued that the price was left wholly to the parties' unrestricted negotiations, and that the contract was therefore invalid because of failure to fix a price.

The plaintiff's position is, *first*, that the above phrase cannot be read alone but must be taken in conjunction with or subject to the text which follows it; *second*, that the text which follows fixes the price with enough definiteness to make a contract.

a. Clauses in paragraph "Third" must be read together.

As already stated defendants rely on the phrase "subject to negotiations between the parties" and disregard all the rest of paragraph Third. (R. 78-9.) But paragraph Third contains other provisions both before and after this phrase about negotiations. In its first paragraph, it names the prices of bottled goods. Then it says that the prices of unbottled goods shall be in the same proportion as between sweet and dry wines. (R. 79 top.) So here is one element which is made categoric and not left to negotiations at all. The relation between prices of unbottled sweet and dry wines shall remain the same as with the bottled goods. Any ambiguity in the language "is to be paid for proportionately as between dry wines and sweet wines the same, but subject to negotiations etc." must likewise be resolved (1) in favor of the validity of the con-

tract and (2) against the defendants. Viewed in this light, the clause evidently means that prices shall remain the same, except as modified under subsequent provisions of the contract. Then after the phrase "subject to negotiations" come the provisions telling what the negotiations are to be about. (See quotation pp. 8-9, *supra*.) The italicized part (p. 9, *supra*) says that fluctuations in elements of labor and production costs shall be reflected in the 1945 sale price. We show further on that taken alone, such a provision fixes the price definitely enough to sustain a contract. (*Infra*, p. 16.)

In the present contract this latter clause must either be taken as limiting the phrase "subject to negotiations between the parties", or (if there be thought to be an inconsistency) as controlling the construction of the contract.

(1) There is actually no inconsistency between the two clauses. The first ("subject to negotiations") makes the general proviso that although 1945 prices shall be in the same proportion as before, certain matters are left open to negotiation. The last part of clause Third gives the specific limits of these negotiations. These specific limitations modify the general provision under the well-known rule that "Particular expressions qualify those which are general". (Civ. Code, Sec. 3534.) Taking the specific language as qualifying the general, we find that the contemplated "negotiations" cover nothing more than (1) ascertaining the changes (if any) which by 1945 may have occurred in the labor and production cost elements of

wine production, and (2) modifying the original prices so as to reflect these changes.

Since the two parts of the last paragraph of clause Third *may* thus be read together, they *should* be. (Civ. Code, Secs. 1641, 3534, *supra*.) Its validity must be tested on that basis.

(2) If the general phrase "subject to negotiations" should be thought inconsistent with the later provision for varying the price according to market fluctuations, then the question is, which must control? Civil Code Section 1652 sets forth the rule for resolving repugnancies in a contract:

"1652. *Repugnancies, how reconciled.* Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."

"The general intent and purpose of the whole contract" *was undeniably to contract with respect to the entire 60,000 case lot.* This is shown *first* by the language in clause "First". (R. 77.)

"First: The party of the second part hereby agrees to purchase approximately 60,000 cases of assorted bottled in California wines, part of which is at present bottled and stored and the balance to be bottled under the terms and conditions to be mutually agreed upon."

The general intention to make a contract covering the entire lot is evinced *secondly* by the simple fact that the contract makes special provisions for the

unbottled part (e.g., clause Third, *supra*). The parties did not insert these clauses merely to fill paper.

So here the rule for interpreting repugnancies coincides with the rule that "an interpretation which gives effect is preferred to one which makes void". If there is any inconsistency between the phrase about "negotiations" and the other provisions for making the 1945 price reflect cost fluctuations, the latter must control. They are the part tending to make a valid contract.

This conclusion is further confirmed by the rule that ambiguities must be construed against the side which drafted the instrument.

(3) So from either standpoint, the interpretation adopted by the defendants and the trial court is incorrect. The phrase about "negotiations" cannot be taken alone, much less as controlling. The subsequent sentences are specific provisions which qualify it. They are the ones which determine whether the price has been fixed with sufficient definiteness. If, however, the general and specific provisions are held inconsistent, the latter still control as giving effect to the contract, as carrying out the general intention of the parties respecting the contract, and as embodying the construction favoring the side which did not draft the instrument. From any viewpoint, the specific provisions are the ones which determine whether the contract sufficiently fixes its price.

We now come to the proposition that prices are determined definitely enough if they are made to depend upon further market conditions.

- b. Prices fixed according to calculations based on future market conditions support a contract.

The latter part of clause Third provides that "increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine shall be considered and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945".

A base price had been fixed for the earlier sales. The above quoted statement provides in effect that this base price shall be raised or lowered according to the increase or decrease of the elements entering into the cost of production of wine. As such, it is a sufficient determination of price. Compare the following authorities:

In *U. S. v. Swift & Co.*, 270 U. S. 124, 70 L. ed. 497, there was no original base price at all. Determination of price was left wholly to future negotiations, which were, however, to take account of the items entering into the cost of production. *Held*: That the price was fixed with sufficient definiteness to allow damages based upon the difference between the contract and the market price. Chief Justice Taft, after reciting findings dealing with market fluctuations, said for the unanimous court:

(pp. 140-41) "It was evidently impossible to make a contract fixing the price of the bacon in advance of the partial performance of it, and the price was therefore left to subsequent adjustment. The Food Administration, by its regulations had already determined that the profit of the seller

should not exceed 9 per cent of the investment or $21\frac{1}{2}$ per cent of the gross sales. Under ordinary conditions, a valid agreement can be made for purchase and sale without the fixing of a specific price. In such a case a reasonable price is presumed to have been intended.”

The data available to fix price in this case were much the same as in the case at bar. In the case at bar there was a previous base price, and an agreement that the 1945 price should be reached by raising or lowering the base price according to the increase or decrease of the cost items. In *U. S. v. Swift & Co.*, the percentage of the buyer's profit had been fixed and the exact price left to determination from the fluctuations of the market. That is, in both cases there was one fixed item and the price was to be ascertained by combining this item with calculations based upon varying market prices or costs.

Just as much as price was determined with sufficient definiteness in *U. S. v. Swift & Co.*, so it is determined with sufficient definiteness here.

Another case upholding the same principle is *Kann v. Wausau Abrasives Co.*, 81 N. H. 535, 129 Atl. 374. There the parties started with a base price of \$45 per ton, which was made subject to yearly revision according to changes in the cost production (labor, materials and supplies). This is strikingly similar to the provisions of the instant contract.

(p. 378) “The price also is certain, the rule being that, ‘either in an executory contract to sell or in a sale, the parties may provide for some means of determining the price later by outside circum-

stances.' 1 Williston, Sales, Sec. 167. The varying element, or outside circumstance, in the present instance, is the increased cost of production due to advances in labor, material, and supplies. The price is to be fixed annually during the five-year period, but the basal figure remains at \$45 per ton. This being so, the price is 'capable of judicial ascertainment' (*Solter v. Leedom & Worrell Co.*, 252 F. 133, 134, 164 C.C.A. 245) and is therefore sufficiently exact. The option being in effect a continuation of the original contract, the provisions relating to credits and deliveries are the same. These provisions are definite."

In *Allen v. Sams*, 120 S. E. 808 (Ga. App.), the price of the goods was made dependent upon calculations based on a future market price (120 S. E. 808, 809 par. 8 of the quoted complaint). Holding this sufficiently definite, the court says:

(p. 808) "The fact that the price of goods sold and delivered was to be ascertained subsequently by the condition of the market within a specified time at a particular place, does not affect the validity or completeness of the sale, unless for some reason the ascertainment by the terms of the contract becomes impossible." (Syl. by Court.)

The following are other cases affirming the same principle.

In *United Lumber Yards Inc. v. Modesto Irr. Dist.*, 23 Cal. App. (2d) 130, the contract provided:

"It is hereby agreed that should the price per barrel of Tufa Cement, *on the open market dur-*

ing the life of this contract, be reduced lower than the price bid per barrel for Tufa Cement in this contract, that the Modesto Irrigation District shall have the benefit of such reduction." (Court's italics.)

Damages were granted upon this price provision.

In *Memphis Furniture Co. v. Wemyss Furn. Co.*, 2 Fed. (2d) 428, 432 (C.C.A. 6), the contract price was fixed as the market price at the date of delivery which was held to furnish enough data to determine price and was therefore sufficiently definite.

Shell Oil Co. of Cal. v. Wright, 167 Wash. 197, 9 Pac. (2d) 106, where the contract provided (p. 107) "said tank wagon price being no cents per gallon less than the sublessor's tank wagon price for commercial gasoline * * *". *Held*: the contract was not invalid because it left the price to be fixed by one of the parties. (9 Pac. (2d) 106, 109).

Johnson Oil Ref. Co. v. Elder, 96 Colo. 314, 42 Pac. (2d) 610, same;

Buggs v. Ford Motor Co., 113 Fed. (2d) 618, holding it sufficient to agree to "sell at such list prices as [one party] shall from time to time determine'."

These cases show that price is sufficiently determined if it is based on calculations of a future market price. In particular is this so where a base price is to be varied according to future market fluctuations.

4. Summary.

With ambiguities resolved in favor of the validity of the contract and against defendants who drafted it, the contract fixes a base price for bottled goods, provides the same price for unbottled goods, except as modified by subsequent clauses. These subsequent clauses provide for "negotiations" by which the 1945 price shall be made to reflect changes in the cost of items entering into the production of wine. This specification of what the "negotiations" shall cover is controlling and shows that in effect they amount to *calculations of future cost levels*. A contract fixing price by such a formula, is sufficiently definite.

D. PROVISION FOR PREACCEPTANCE LEAVES CONTRACT VALID.

On the motion for new trial after the first trial defendants also argued that the contract was too indefinite as to unbottled goods because of the provision for preacceptance (R. 79, par. "Fourth"):

"On quantities not yet bottled it is agreed that prior to acceptance, samples will be forwarded to the party of the second part for its approval, and in the event of non-approval nothing herein contained shall prevent party of the first part from disposing of such stocks through other channels if it should desire."

Defendants claim that this clause gives the plaintiff an unlimited right of rejection and that therefore the contract lacks mutuality. In the first place, defendants' interpretation is faulty. The wine is represented as being of a certain quality. The batch already bottled has been preaccepted, and the buyers

are foreclosed from raising any objection to the quality. The remainder *is to be sampled* when bottled. If the buyer approves the *sample* he waives objection to quality *as to the entire lot*.

On the other hand, he has the right to reject the entire lot if the sample is not up to standard. (The standard was set with particular care in the modifying letter attached to the contract—R. 82-3.) In such a case, the seller may sell elsewhere, without incurring liability. Thus the agreement is for approval or disapproval of the entire lot on the strength of *a sample*.

The buyer's action on the sample binds him as well as defendants *as to the entire lot*. In this respect the agreement of the parties deviates from the ordinary rule that the seller warrants the bulk to be the same as the sample. (Civ. Code 1736.) In this respect the contract was therefore more favorable to the seller than the ordinary rule. Both sides were bound by the agreement so there was no lack of mutuality.

But even apart from the element of sampling, the buyers' right of rejection for quality does not create lack of mutuality.

See:

Godlove v. Russell, 184 Or. 445, 293 Pac. 936,
937:

“Respondents were accorded the right to pass upon the question of whether appellant's eggs were of the quality thus defined. This right on respondents' part of approval or rejection because of quality, could not be exercised caprici-

ously but only in good faith, and hence did not render the subject matter indefinite as to amount or quality, nor constitute a condition precedent of such a nature as to invalidate the contract. 1 Williston on Sales (2d Ed.) 353, sec. 191, and cases cited in note 78."

E. SUMMARY.

The contract provides that the prices of unbottled goods shall be fixed by modifying current prices according to changes in cost which might take place in the year 1945. This makes the price sufficiently definite to sustain the contract. The use of the word "negotiations" does not weaken this conclusion. The preacceptance clause likewise leaves this part of the contract valid. In short the parties validly contracted as to the unbottled part of the wine. The trial court therefore erred in withdrawing it from the jury's calculation of damages. Damages should have been submitted upon the full amount of 60,000 cases. If for any reason there should be a new trial, it should be granted with directions to instruct the jury to render a verdict on the entire lot of 60,000 cases.

II. IN ANY EVENT THE TRIAL COURT ERRED IN NOT SUBMITTING THE ISSUE OF DAMAGES UPON THE NUMBER OF CASES SHIPPED DURING 1943 AND 1944.

If it be held that the trial court correctly refused to submit the issue of damages on 60,000 cases, there was nevertheless error in restricting damages to 26,691 cases.

This proposition is covered by plaintiff's second ground of cross-appeal (R. 549):

"2. Alternatively and in any event, the court should have submitted the issue of damages to the jury upon the basis of the number of cases (approximately 36,000) which were contracted to be shipped during the remainder of the year 1943 and during the year 1944, instead of on the basis of only 26,691."

(And see appendix for requested instructions and exceptions preserving this issue.)

The point of this assignment is that even if the 1945 prices be considered too indefinite, the 1945 prices do not cover the entire balance of 33,309 cases.

Prices through 1944 were fixed definitely. Under the rules of interpretation already noted, any ambiguity as to whether these prices cover unbottled goods sold in 1944, must be resolved in favor of a specific and valid contract. This is contrary to the position taken by the trial court; for submitting the issue of damages upon the basis of 26,691 cases involved a holding that none of the bottled goods had a determinable price even though they might be sold in 1944. The question turns upon the following clauses of the contract (R. 78):

"Third: The quantities now bottled and stored may be stated approximately as follows: [tables] and the price for this block of merchandise herewith mutually agreed upon to be paid to first party by second party shall be as hereby stated and subject to the terms and conditions as herein stipulated. *During the year 1943* dry wines will

be billed on the basis of Five Dollars and twenty-five cents (\$5.25) per case and the sweet wines at Six Dollars (\$6.00) per case. * * * *During the year 1944* payment shall be made on the basis of Five Dollars and Fifty Cents (\$5.50) per case for dry wines, and Six Dollars and Twenty-five Cents (\$6.25) per case for sweet wines * * *

“* * * the balance of the amount of the sale which has not been bottled, *is to be paid for proportionately as between dry wines and sweet wines the same*, but subject to negotiations whereby * * * the prices governing the remainder of the transaction will be determined in the light of conditions existing *during the year 1945.*” (Italics added.)

It is certainly a reasonable interpretation to hold that *this last clause is intended to apply only to sales made in the year 1945.*

What then is the price for *unbottled* goods sold in 1944? The answer must be found in the clause italicized above: “The balance of the amount of the sale which has not been bottled is to be paid for proportionately as between dry wines and sweet wines the same”. In other words, *unbottled* wines sold during 1944 carry the same price as bottled wines sold in the same year. These provisions read together indicate that it was the intention of the parties to contract for the sale of wines over a 3 year period, perhaps averaging around 20,000 cases of wine per year.

The remaining question is, how much wine will be sold by the end of 1944?

This is answered by the provision of paragraph *Second* of the contract (R. 72) that one car a month shall be shipped each month during 1943 and 1944 with the understanding that if plaintiff wanted additional amounts at the holiday season it could have two cars in a particular month. The "holiday season" presumably means Thanksgiving and the Christmas-New Year week. A car is 1500 cases. (R. 217.) Under the modification agreement (R. 82-3) deliveries were to commence approximately 60 days from February 3, 1943. There were thus nine months in 1943 and twelve months in 1944. Two months in each year the plaintiff was to receive two cars; otherwise a car a month. This makes a total of 25 cars, or at the rate of 1500 cases per car, 37,500 cases. The first 26,691 of these are bottled, the rest unbottled. But all come under the 1943 and 1944 price schedule. As to this lot the price was definite even if the 1945 price was too indefinite. Consequently the jury should have been instructed to find damages upon 37,500 cases, at least.

III. ON THE ISSUE OF DAMAGES, THE COURT SHOULD HAVE ADMITTED EVIDENCE OF PRICES OBTAINED BY DEFENDANT ON SALES OF THE WINES IN THE CONTRACT TO OTHER CUSTOMERS.

After the defendants broke their contract with plaintiff, they turned around and sold the same wines to others customers, for prices ranging from \$6.50 to \$8.50 a case. (See offer of proof of plaintiff, R. 261, 262; plaintiff's exhibit 13A, being a list of defendants' sales and prices—facing R. 266. The de-

fendants' deposition, plaintiff's exhibit 13B, R. 283-295, contains oral testimony as to sales made between the first and second trials.) Testimony to that effect was excluded by the trial court: See R. 258-259, testimony of Jean Bercut,

“Q. Following the month of April, and particularly the 27th day of April, 1943, did you sell those wines in the open market?

Mr. Naus. Objected to as immaterial and as being wholly outside the issues.

The Court. Sustained.

Mr. Bourquin. We may have an exception to the ruling, your honor.

The Court. Yes.”

Similar questions, objections and rulings, for the months following April, appear on R. 259-60.

On R. 255 the court sustained objections to questions as to sales of *similar* wines upon the additional ground that the complaint pleaded only loss of profits.

The court limited plaintiff to loss of profits upon the issue of damages. (See R. 308-11, 318-20.) Plaintiff's position is that defendants' sales were admissible as *an alternative measure of damages* (as was held at the first trial). They are admissible on either one of two theories:

First: Assuming there is no market and no market value for the wines, one measure of damages is the difference between the contract price and the “actual” value. Prices on individual sales by defendants of the same wine are *some evidence* of such value.

Second: Assuming that defendants' sales (of the same wine) on the general market establish a market price, the prices on such sales are admissible to establish the difference between the contract and the market price.

The allegations of the complaint do not limit plaintiff's measure of damages.

We first take up the grounds upon which evidence of defendants' sales is admissible and shall then give the authorities showing that plaintiff's complaint does not limit its proof.

**A. PRICES ON SALES BY DEFENDANT ADMISSIBLE
TO PROVE VALUE.**

1. **One measure of damages in absence of market is difference between contract price and actual value.**

Where the seller fails to deliver goods which are unobtainable on the general market, there is a variety of rules for measuring damages. Since the goods cannot be bought on the market, they are said to have no market value, even though the particular lot may be readily sold. One measure of damages is analogous to the rule respecting goods which *do* have a market value; namely, to ascertain the value of the unobtainable goods and then fix damages at the difference between the value and the contract price. See:

55 *C.J.* 1161.

“Where the goods have no market value, resort must be had to other elements of value, and the measure of damages has been held to be the difference between the agreed price and the reason-

able or actual value of the goods, which value must be ascertained by the best evidence available.

55 *C.J.* 1174.

“As in the case where the goods have no market value, if the goods cannot be obtained in the open market, the general rule of damages will not apply, and resort must be had to other elements of value. * * *”

To the same effect 46 *Am. Jur.* 811-12.

2. Prices on individual sales are evidence of value.

The prices which a product commands on individual sales are *some evidence* of its actual value. Where no general market price can be established, prices received on such sales are admissible in evidence. The *Corpus Juris* passage quoted above continues as follows:

55 *C.J.* 1161.

“The value of the goods may be determined * * * by the advanced price at which the buyer has agreed to sell them, or the price at which the buyer had sold like goods just prior to the breach * * *.”

Individual sales being evidence of value, it makes no difference by whom the sales are made. As a matter of logic, sales by the buyer and sales *by the seller to third persons* are equally relevant. While there are comparatively few cases on this precise point, those which we have found sustain our position. See the following:

a. Sales by defaulting seller.

Granberry v. Frierson (1873), 61 Tenn. (2 Baxter) 326, where the defendant broke his contract with plaintiff and sold the goods to other customers, the court said,

(p. 328.) “* * * In an action therefor the measure of the plaintiff’s damages would be the difference between the agreed price and that received by the defendant, less the reasonable costs and expenses of the resale.”

Duncan v. McMahan (1856), 18 Tex., 597, 609.

“* * * The jury had a right to adopt the estimate which they deemed nearest the truth; and they probably estimated the quantity at forty-four bales, weighing five hundred pounds each; the price contracted to be paid for it; * * * and its value in Houston at what it is proved to have been actually sold for there * * * . These estimates make the difference between the price at which the plaintiff purchased, and that which the defendant afterwards sold (which was the lowest estimate of value the jury was warranted in finding) the precise amount of the verdict. That the plaintiff was entitled to recover that amount does not admit of question. * * * .”

To the same effect: *Brent v. Richards* (1846), 43 Va. (2 Gratt.), 539, 544.

In *Moss v. Sherburne* (1926), 11 Fed. (2d) 579 (CCA1), the seller broke his contract to deliver to the buyer. The buyer then obtained the goods *under a new contract from the same seller*. In other words, there was a sale by the defaulting seller, but to the

original buyer rather than to a third person. *Held*: That the price under the new contract was evidence of value. Plaintiff could recover the difference between this and his original contract price. The court stated:

Moss v. Sherburne, 11 Fed. (2d) 579, 582.

“There was no error in admitting the price in the second contract as evidence of the market value of the sugar described under the first contract at Buenos Aires on the date of the breach of this contract * * *.”

Under these cases the prices received by the defendants on sales to third persons, were relevant as tending to show value of the wine at the dates of sale.

We now give other cases admitting evidence of price and individual sales.

b. Sales or prospective sales by buyer.

Sales or contracts for sale by the buyer are similarly competent to prove actual value:

See *Western Indemnity Co. v. Mason M., etc.*, 56 Cal. App. 355, 363.

“Further objection is made that the trial court erred in admitting in evidence contracts made by plaintiff for the sale of potash which it manufactured from the slops purchased from the defendant. * * *

(p. 364.) The contract here sued on was one dealing with the sale of slops. This commodity was not obtainable elsewhere. There was, so far as the record shows, no market price for it. * * *

In such a case the authorities are clear that where a breach occurs under such circumstances the vendor is liable on his contract for any damages resulting to the vendee arising from a failure to deliver the property where such damages are not remote and speculative, and that *his contract is admissible to prove value.* * * * Here the contracts were offered and received not for the purpose of proving the amount received, for the product, but for the sole and limited purpose of tending to show that it could be sold and that it had some market value * * * *this evidence was responsive to the issue that the product had a value.* * * * The trial judge, in referring thereto, frequently expressed his view that *evidence of what an article could be sold for was some evidence of market value.*” (Italics added.)

This case uses “market value” even with reference to goods not obtainable on the general market. The last sentence—“evidence of what an article could be sold for”—is broad enough to include sale by the seller as well as by the buyer. (See Subd. “a”, supra.) So in the present case, the evidence which plaintiff offered on prices was admissible to prove value. To the same effect:

J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 71 Ind. App. 401, 118 N.E. 360, 368;

Pape v. Ferguson, 28 Ind. App. 298, 62 N.E. 712, 714;

Trigg v. Clay, 88 Va. 330, 13 S.E. 434 (at 434).

3. Summary.

Evidence of prices at which the sellers (defendants) sold the wine to other customers was admissible to prove value.

B. SALES BY DEFENDANTS TENDED TO ESTABLISH MARKET VALUE.

1. Sales by seller tend to establish market price.

So far we have discussed the case according to the theory on which it was tried—that the wine was unobtainable on the market and therefore had no market price. Had plaintiff attempted to supply itself after the breach, plaintiff would have had to buy the same wine from the defendants, at defendants' prices. The question is, whether sales by the defendants of the very products about which the parties contracted, establish a market price. What little authority there is on this point is in the affirmative. In the first place, a purchase by the buyer from the seller under a new agreement is evidence of *market price*. *Moss v. Sherburne*, 11 Fed. (2d) 579, 582, quoted *supra*. In the second place, market price may be established by sales of much smaller quantities than what the buyer originally contracted to buy. See 55 *C.J.* 1142, N. 72, citing

Faulkner v. Closter, 79 Iowa 15, 44 N. W. 208, which applies this rule.

It is therefore submitted that when defendants threw the wine upon the general market they thereby established a market price. Plaintiff could prove this price in order to show the difference between market and

contract price. (Sales Act Sec. 67, Civ. Code Sec. 1787.)

2. Sales by defendants relevant as to date.

The sales by the defendants took place at various dates after the anticipatory breach of April 27, 1943. (See plaintiff's Exhibit 13A for identification, opposite R266, giving dates of sales through February 26, 1944.) The market price at these dates is relevant, since the plaintiff's contract was for installment deliveries throughout the years 1943-44-45. The breach was an anticipatory breach. In such cases the measure of damages is the difference between the contract price and the market price at the place and *time of delivery*. See Civ. Code Sec. 1787(3): where time of delivery is fixed, measure of damages is **difference** between contract price and market price at time of delivery; also,

U. S. Trading Co. v. Newmark, 56 Cal. App. 176, 191;

Filice & Perrelli C. Co., Inc., v. Walton, 95 Cal. App. 7, 11;

Meyer v. Sullivan, 40 Cal. App. 723, 732;

Segall v. Finlay, 245 N.Y. 61, 156 N.E. 97, 98 (Uniform Sales Act);

Schopflocher v. Zimmerman, 240 N.Y. 507, 148 N.E. 660, 661 (same);

Goldfarb v. Campe, 164 N.Y. Supp. 583, 589 (same);

Monaghan v. Alexander, 76 Utah 81, 287 Pac. 908 (same);

- Wilson Motor Co. v. Lamping Motor Co.*, 194 Wash. 416, 78 Pac. (2d) 559;
Woerman v. McKinney-Guedry Co., 174 Ky. 521, 192 S.W. 684, 685, 688;
Alpha Portland Cement Co. v. Oliver, 125 Tenn. 135, 140 S.W. 595, 596.

C. COMPLAINT DOES NOT LIMIT PLAINTIFF'S PROOF.

The amended complaint asked for lost profits. (R. 13.) But that does not limit the measure or proof of damages. The measure of damages is a legal conclusion flowing from the cause of action. The court will apply whatever measure the plaintiff is entitled to, even if the complaint states an incorrect measure (which this complaint did not). Compare:

Hulen v. Stuart, 191 Cal. 562, 569 (top).

“Even though the plaintiff in stating her cause of action had mistaken the measure of the recovery which she sought, it would have made no difference.”

W. C. Cook & Co. v. White Truck Tr. Co., 124 Cal. App. 721, 726;

Mitchell v. Clark, 71 Cal. 163, 167, 168;

Olds & Stoller v. Seifert, 81 Cal. App. 423, 427.

IV. SUMMARY.

The contract made the price of unbottled goods sufficiently definite. Damages should have been computed upon the entire lot of 60,000 acres. At all events, the price was fixed throughout the years 1943

and 1944. At the very least damages should have been based upon the wine to be sold during those years (about 37,500 cases).

The prices which defendants obtained on sales of the wines covered by the contract, to third parties were relevant to prove either actual (non-market) or market value.

Plaintiff does not desire a third trial of this case. But if there is a third trial the District Court should be directed to submit the issue of damages to the jury upon the entire 60,000 cases, and to admit the heretofore excluded evidence of defendants' sales.

Dated, San Francisco, California,
November 29, 1944.

Respectfully submitted,

ALFRED F. BRESLAUER,

THELMA S. HERZIG,

M. MITCHELL BOURQUIN,

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*Attorneys for Plaintiff
and Cross-Appellant.*

(Appendix Follows.)

Appendix.

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Appendix

(Material not quoted in body of brief.)

PLAINTIFF'S PROPOSED INSTRUCTIONS.

(R. 25-6.) Plaintiff's Instruction No. 1.

This is an action between Park-Benziger & Co., Inc., a corporation, as plaintiff, and Pierre Bercut and Jean Bercut, doing business as P & J Cellars, defendants. This action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendant's contract to sell and deliver 60,000 cases of wine.

Given. St. Sure, D. J.

Although this instruction is marked "given" it was modified by striking out the last eight words. See brief p. 8 and the court's charge *infra*.

Plaintiff's Instruction No. 1-A.

(If Instruction No. 1 is not given as is, respecting number of cases, plaintiff proposes the following alternative instruction):

This is an action between Park-Benziger & Co., Inc., a corporation, as plaintiff, and Pierre and Jean Bercut, doing business as P & J Cellars, defendants. The action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendants' contract to sell and deliver one carload a month during the years of 1943 and 1944 and one additional car per month during the holidays of said years if so desired by plaintiff.

Refused. A. F. St. Sure, D. J.

(R. 35-8.) Plaintiff's Instruction No. 15.

The court instructs you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on 60,000 cases of wine, and you find that said profit could reasonably have been expected, and if

you find that said wines are unobtainable on the market, and if your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding \$237,750.00 as and for general damages.

Shoemaker v. Acker, 116 Cal. 239;

Stephany v. Hunt Bros. Co., 62 Cal. App. 638;

Robinson v. Rispin, 33 Cal. App. 536;

Caspary v. Moore, 21 Cal. App. (2d) 694.

Given as modified. St. Sure, D. J.

Plaintiff's Instruction No. 15-A.

(If Instruction No. 15 is not given in the form requested as to the number of cases then the following instruction):

The court instructs you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on the wine which the defendants agreed to ship in the years 1943 and 1944, and you find that said profit could reasonably have been expected and if you find that said wines are unobtainable on the market, and if your verdict is for the plaintiff you will find general damages for the plaintiff in an amount not exceeding \$237,750.00.

Refused. St. Sure, D. J.

Plaintiff's Instruction No. 16.

You are instructed that when the seller of goods repudiates and fails to perform his contract prior to the delivery of said goods, and when said goods are generally available on the market, the measure of damages to the buyer is the difference between the contract price and the market value of said goods, at the times when they ought to have been delivered.

If you find that the plaintiff was damaged due to defendants' failure to perform the contract for sale of goods prior to delivery thereof, and that said goods are available on the market, then the plaintiff is entitled to the difference between the contract price and the market price for 60,000 cases of wine as of the dates agreed upon for delivery, and you should find a verdict for the plaintiff in an amount not exceeding \$237,750.00, as and for general damages, the amount prayed for in the complaint.

U. S. Trading Co. v. Newmark, 56 Cal. App. 176, 191;

Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567;

California Civil Code, Section 3300;

California Civil Code, Section 1787;

Monaghan v. Alexander, 76 Utah 81, 287 Pac. 908 (Sales Act);

Schopflocher v. Zimmerman, 240 N. Y. 507, 148 N. E. 660 (Sales Act, Cardozo, J.);

Segall v. Finlay, 245 N. Y. 61, 156 N. E. 97 (Sales Act).

Refused. A. F. St. Sure, D. J.

Plaintiff's Instruction No. 16-A.

(If Instruction No. 16 is not given in the form requested as to the number of cases, then the following instruction):

You are instructed that when the seller of goods repudiates and fails to perform his contract prior to the delivery of said goods, and when said goods are generally available on the market, the measure of damages to the buyer is the difference between the contract price and the market value of said goods, at the times when they ought to have been delivered.

If you find that the plaintiff was damaged due to defendants' failure to perform the contract for sale of goods prior to delivery thereof, and that said goods are available on the market, then the plaintiff is entitled to the difference between the contract price and the market price for the number of cases which defendants agreed to deliver during the years 1943 and 1944 as of the dates agreed upon for delivery, and you should find a verdict for the plaintiff in an amount not exceeding \$237,750.00 as and for general damages the amount prayed for in the complaint.

Refused. St. Sure, D. J.

(R. 64.) Defense Request No. 39.

In the instructions I have given you thus far I have given you the general rules for measuring damages. I further instruct you, however, that a buyer who claims damages from a seller for non-delivery of the goods is always under a duty to minimize or

mitigate his damages, that is, to keep them down if reasonably possible. There is conflicting testimony before you as to the amount of wine offered by Jean Bercut to plaintiff immediately after the cancellation agreement of April 27, 1943, was signed and delivered. If you find that he then offered to plaintiff only three carloads of the same wine for cash but otherwise at the contract price and terms, then you cannot award plaintiff any lost profits on those three cars, aggregating approximately 4,500 cases, because plaintiff's duty to keep his damages down exists even though the Bercuts were the only source whence the wine could be obtained. The 26,691 cases covered by the contract must accordingly be reduced to the extent of the three carloads or approximately 4,500 cases.

Lawrence v. Porter, 6 Cir., 63 Fed. 62, 66, and cases there cited;

Brookridge Farm v. U. S., 27 F. Supp. 909, 910-911.

Given. St. Sure, D. J.

(R. 65.) Defense Request No. 40.

If you find that immediately after the cancellation agreement of April 27, 1943, was signed and delivered, Jean Bercut offered to the plaintiff not merely three carloads but all of the 26,691 cases of wine on hand at the prices stated in the contract, but for cash in advance, then in that event I instruct you that regardless of whether or not other wine was available elsewhere in the market, you cannot award to

plaintiff any damages because of a market price in excess of the contract price, nor any damages because of loss of anticipated profits.¹ The only damage to plaintiff through paying cash in advance would be limited to interest for the use of its money for the short period of time between the date of cash payment in advance and the time of arrival of the wine at destination thereafter when the plaintiff would otherwise have been required to pay the draft attached to the bill of lading for each carload.²

Given. St. Sure, D. J.

[Endorsed]: Filed Mar. 22, 1944.

(R. 478.) The Court. I shall give plaintiff's instruction No. 15 amended as follows: Have you got it?

Mr. Naus. Yes, your Honor.

The Court. Striking out on line 11 the figure "60,000" and inserting in lieu thereof "26,691." And striking out on line 12, after the word "inspected," the following words: "and if you find that said wines are unobtainable on the market."

Mr. Naus. Those words are being stricken out?

The Court. Yes. "And if you find said wines are unobtainable on the market," being stricken out, and inserting after the word "exceeding" on line 15 the

¹Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117.

²Warren v. Stoddart, *supra*;

Note, 46 A.L.R. 1192, at 1194; and California cases at 1195;

Lawrence v. Porter, 6 Cir., 63 Fed. 62.

words “the amount of any such profit.” Striking out the figures, “237,750.” Have I made that clear?

Mr. Naus. Yes, your Honor.

The Court. “If your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding the amount of such profits as and for general damages,” striking out the figures and the dollar sign, “\$237,750.”

I am also giving defendants’ request No. 39.

I shall give defendants’ request No. 40.

(R. 479.) The Court. Just a minute. I expect to refuse to give the following: Defendants’ request No. 23, defendants’ request No. 26, defendants’ request No. 27, defendants’ request No. 24, defendants’ request No. 25, defendants’ request No. 13, defendants’ request No. 15, defendants’ request No. 16, defendants’ request No. 22, defendants’ request No. 29, defendants’ request No. 30, defendants’ request No. 32, defendants’ request No. 33, defendants’ request No. 34, defendants’ request No. 37, plaintiff’s request No. 1(a), plaintiff’s No. 4, plaintiff’s No. 5, plaintiff’s No. 5(d), plaintiff’s No. 13, plaintiff’s No. 14, plaintiff’s No. 16(a), plaintiff’s No. 17, plaintiff’s No. 15(a), plaintiff’s No. 16.

(R. 492.) Then in the refusal of our requests we except to the refusal of 1-A, 4, 5, 5-B, 13, 14, 15-A——

The Court. 16-A?

Mr. Olshausen. Yes, 16——

The Court. 16-A.

Mr. Olshausen. 16-A I have here, and 16 is, too; I haven’t come to it yet. Yes. 16. That simply again

is the same point which came up, in part, at least, on the granting of the first motion for a new trial, and 16 is the same way, 16-A. That is all.

(R. 505.) Tuesday, March 21, 1944, 10:00 o'clock A. M.

The Court. Park, Benziger & Co. v. Bercut, on trial.

Mr. Olshausen. There is one other matter. It is that in case it is necessary for the record we state that the grounds upon which we have taken exception to the instructions refused or modified—we are of the opinion and take the position that the instructions as requested were correct statements of the law and supported by the evidence.

CHARGE TO THE JURY.

(R. 508.) The Court (orally). This is an action between Park, Benziger & Co., Inc., a corporation, as plaintiff, and Pierre Bercut and Jean Bercut, doing business as P & J Cellars, defendants. The action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendants' contract.

(R. 521-3.) I instruct you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on 26,691 cases of wine, and you find that said profit could reasonably have been expected, and if your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding the amount of such profit.

In the instructions I have given you thus far I have given you the general rules for measuring damages. I further instruct you, however, that a buyer who claims damages from a seller for non-delivery of the goods is always under a duty to minimize or mitigate his damages, that is, to keep them down if reasonably possible. There is conflicting testimony before you as to the amount of wine offered by Jean Bercut to plaintiff immediately after the cancellation agreement of April 27, 1943, was signed and delivered. If you find that he then offered to plaintiff only three carloads of the same wine for cash but otherwise at the contract price and terms, then you cannot award plaintiff any lost profits on those three cars, aggregating approximately 4500 cases, because plaintiff's duty to keep his damages down exists even though the Bercuts were the only source whence the wine could be obtained. The 26,691 cases covered by the contract

must accordingly be reduced to the extent of the three carloads or approximately 4500 cases.

If you find that immediately after the cancellation agreement of April 27, 1943, was signed and delivered, Jean Bercut offered to the plaintiff not merely three carloads but all of the 26,691 cases of wine on hand at the prices stated in the contract, but for cash in advance, then in that event I instruct you that regardless of whether or not other wine was available elsewhere in the market, you cannot award to plaintiff any damages because of a market price in excess of the contract price, nor any damages because of loss of anticipated profits. The only damage to plaintiff through paying cash in advance would be limited to interest for the use of the money for the short period of time between the date of cash payment in advance and the time of arrival of the wine at destination thereafter when the plaintiff would otherwise have been required to pay the draft attached to the bill of lading for each carload.

No. 10,823

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individually,
and as Copartners doing business as P & J
Cellars (a copartnership),

Appellants,

vs.

PARK, BENZIGER & Co., INC. (a corporation),

Appellee,

and

PARK, BENZIGER & Co., INC. (a corporation),

Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually,
and as Copartners doing business as P & J
Cellars (a copartnership),

Cross-Appellees.

BRIEF FOR CROSS-APPELLEES.

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FILED

DEC 27 1944

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individually,
and as Copartners doing business as P & J
Cellars (a copartnership),

Appellants,

vs.

PARK, BENZIGER & Co., INC. (a corporation),

Appellee,

and

PARK, BENZIGER & Co., INC. (a corporation),

Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually,
and as Copartners doing business as P & J
Cellars (a copartnership),

Cross-Appellees.

BRIEF FOR CROSS-APPELLEES.

May it please the Court:

We challenge cross-appellant's statement of jurisdiction. It rests appellate jurisdiction upon "28 U.S.C.A. 225(a)", Judicial Code § 128, which grants appellate jurisdiction to review "final decisions", but the cross-appeal seeks review of a non-appealable intermediate ruling, i.e., the ruling refusing cross-appellant's request that the issue of damages be submitted to the jury on the basis of 60,000 cases of wine instead of 26,691 cases.

Cross-appeals must be taken, perfected and prosecuted under the same conditions or circumstances and in the same manner as other appeals, 4 C.J.S. 883, § 427. There must be a notice of appeal, Rule 73 FRCP, from a final decision, Judicial Code § 128. "An appeal cannot be taken from a *part* only of a judgment, order or decree, unless there is a statute permitting it", 4 C.J.S. 204, § 109, and we know of no act of Congress permitting it. Some state statutes, e.g., California, permit it, as in Calif. Code Civ. Proc. § 940, which calls for a notice of appeal from the judgment, or "some specific part thereof". The judgment at bar, however, is without severable parts; it is single, one unit, indivisible, a simple judgment awarding a liquidated sum of money as damages for breach of one contract, declared upon in a single count. The notice of cross-appeal, R. 543, is headed "Notice of Appeal from *Portion* of Judgment", and the text of the notice appeals "from that *portion* of the judgment entered in the above entitled action limiting plaintiff's recovery to the sum of \$72,687.50". An inspection of the judgment, R. 67-68, does not disclose such a "portion"; it is a clerk's form of "judgment on verdict", and the text is,

" * * * it is considered by the Court that said plaintiff do have and recover of and from said defendants the sum of \$72,687.50", with costs,

and is based upon a general verdict, R. 66, which reads:

"We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of \$72,687.50."

In jurisdictions wherein an appeal is permitted from a portion of a judgment, the portion must be severed and

identified *in terms* by the judgment itself; and if not, then under a notice of appeal limited by its text to a "portion" of the judgment, the appeal will be dismissed "upon the ground that it is not taken from the judgment, or from any part thereof", *Bank of Visalia v. Curtis*, 131 Cal. 178, 63 Pac. 344; 2 Cal. Jur. 154, § 25. In the cited case, the Court dismissed the appeal, and refused to review an intermediate ruling not carried in terms into the judgment.

It follows that the attempted cross-appeal should be dismissed. The case distinguishes from *Galloway v. General Motors Acceptance Corporation*, 4 Cir., 106 F. 2d 466. There, the appellant failed through an affirmance on the narrower ground of the merits, and hence the ruling leaves unaffected the broader ground of appellate jurisdiction. (See *Ex parte Bakelite Corp.*, 279 U. S. 438, at 448, bottom, and cases cited in marginal note 3.) If we assume arguendo that the case decides in favor of the right to review a portion of a judgment, nevertheless the judgment there was clearly severable or apportionable in its terms.

There is still less basis for review of the other major ground, cross-appellant's Proposition III, relating to a claim of admissibility of evidence. Admission or non-admission of evidence is an intermediate, non-appealable ruling, and there is nothing in the terms of the judgment that states or recites anything about evidence admitted or excluded. "It is elementary that an appeal from a portion of a judgment brings up for review only that portion designated in the notice of appeal", *Glassco v. El Sereno Country Club*, 217 Cal. 90, 92, 17 P. 2d 703, col. 2,

and an Appellate Court is without authority to review any unappealed portion, *Pacific Mutual Life Ins. Co. v. Fisher*, 106 Cal. 224, 237, 39 Pac. 758, 761.

If the cross-appeal is not dismissed, it nevertheless raises no showing of error in the rulings complained of, to which rulings we turn.

I.

ASSUMING A CASE THAT SHOULD HAVE GONE TO THE JURY AT ALL, IT WAS PROPER TO REFUSE TO SUBMIT A BASIS OF 60,000 CASES.

The contract of January 29, 1943, plaintiff's Exhibit 2 (printed as Appendix A to our opening brief on the main appeal) is not a binding contract between the parties for the whole of the 60,000 cases, nor for any quantity in excess of the 26,691 cases specifically described in the contract.

(a) In the contract, in paragraph "Third", an aggregate of 26,691 cases is specifically described as "the quantities now bottled and stored"; and paragraph "Third" then states:

"and the price for **this block of merchandise** herewith mutually agreed upon * * * shall be as hereby stated",

the price for the block is then fixed as follows:

	<u>In 1943</u>	<u>In 1944</u>
Dry	\$5.25	\$5.50
Sweet	6.00	6.25

The next sub-paragraph of the contract reads as follows (brackets added by us):

“It is agreed that shipment of the above mentioned quantities [26,691 cases] will be made first and before any other commitments, and that the balance of the amount of the sale, which has not been bottled [33,309 cases], is to be paid for proportionately as between dry wines and sweet wines the same, but subject to **negotiations** between the parties hereto whereby increases or decreases due to changed conditions affecting labor costs or other factors that enter into the production of wine will be taken into consideration and the prices governing the remainder of the transaction will be determined in the light of conditions existing during the year 1945.”

As to the 33,309 cases there is accordingly before the Court an open price contract. Such contracts may be of two kinds: (1) the contract may be wholly silent, thereby leaving the matter to implication; or (2) the contract may contain an expression, in which case there is no room for an implication. Section 9 of the Uniform Sales Act, Calif. Civil Code § 1729, provides in subdivisions (1) and (4) as follows:

“§ 1729. *Definition and ascertainment of price.*

(1) The price may be fixed by the contract, or may be left to be **fixed in such manner as may be agreed**, or it may be determined by the course of dealing between the parties.

(2) * * *.

(3) * * *.

(4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.”

An illustration of a proper case under subdivision (4) is found in *Great Western Distillery Products, Inc. v. John A. Wathen Distillery Co.*, 10 Cal. 2d 442, 74 Pac. 2d 745, where the contract was wholly silent upon the subject of price, thereby raising an implication of a "reasonable price"; and that is equally true of *Dickerman v. Ohashi Importing Co.*, 63 Cal. App. 101, 218 Pac. 458. The case at bar, however, does not fall under subdivision (4), but falls under subdivision (1), because the contract is not silent but instead states how the price is to be arrived at: it is to be "subject to negotiations between the parties".

Subdivision (1) is but declaratory of the law, which contains many illustrative instances. Thus, in *Jules Levy & Bro. v. A. Mautz & Co.*, 16 Cal. App. 666, 117 Pac. 936, the contract stated the prices "were to be fixed by the subsequent agreement of the parties", but they did not subsequently agree. The Court said:

"It is elementary in law that a contract of sale must be certain as to the thing sold, and designate the price to be paid for it (Civ. Code, § 1727); and it is well settled that if an executory contract of sale is uncertain and incapable of being made certain in the essential particular of the price to be paid for the thing sold, neither of the parties can be held to its terms, nor recover damages for its breach, *Breckenridge v. Crocker*, 78 Cal. 533, 21 Pac. 179; *Association v. Phillips*, 56 Cal. 539; *Talmadge v. Arrowhead*, 101 Cal. 367, 35 Pac. 1000; *Nat. Bank v. Hall*, 101 U. S. 50, 25 L. Ed. 822; *Schenectady Stove Co. v. Holbrook*, 101 N. Y. 48, 4 N. E. 4; *Grafton v. Cummings*, 99 U. S. 106, 25 L. Ed. 366.

It is true generally that where no price is fixed in a contract for the sale of a commodity the law, upon

a delivery and acceptance of the things sold, implies an understanding between the parties that a reasonable price is to be paid, and in such a case the contract will be deemed to be executed. In other words, in the absence of a fixed price, or an agreement as to the mode of ascertaining the value of the goods sold and delivered pursuant to the contract of sale, the purchaser will be held liable for the reasonable value of the goods. 1 Mechem on Contracts, § 206; Benjamin on Sales (7th Ed.) p. 91, § 85; Taft v. Travis, 136 Mass. 95; Prenatt v. Runyon, 12 Ind. 174.

Where, however, the price of the commodity called for, but not delivered, is to be subsequently ascertained and fixed by the valuation of others, or by the agreement of the parties, the contract of sale is incomplete and non-enforceable until the price is so fixed or agreed upon. Wittkowsky v. Wasson, 71 N. C. 451; Bigley v. Risher, 63 Pa. 152; Foster v. Lumberman's Mining Co., 68 Mich. 188, 36 N. W. 171; Williamson v. Berry, 8 How. 544, 12 L. Ed. 1170; Devane v. Fennell, 24 N. C. 36; Albermarle Lumber Co. v. Wilcox, 105 N. C. 34, 10 S. E. 871; 1 Mechem on Contracts, § 209; Wilken Mfg. Co. v. Lumber Co., 94 Mich. 158, 53 N. W. 1045; Bales v. Gilbert, 84 Mo. App. 675; Hutton v. Moore, 26 Ark. 382. In the case at bar the prices to be paid for the goods which were to be purchased yearly by the defendant, for a period of five years, as well as the terms and conditions upon which the sales of said goods and merchandise were to be made, were not specified in the contract, but were, as indicated by the contract and the findings of the court below, to be ascertained and fixed from time to time by the future agreement of the parties.

The due execution of a contract requires the assent of at least two minds to each and all of the essentials of the agreement; and it is only upon evidence of such

assent that the law enforces the terms of a contract or gives a remedy for a breach of it. It is apparent from the findings that the minds of the parties in this instance never met upon the essentials of price and terms of payment; and therefore the trial court's conclusion of law that the contract in controversy was void and incapable of enforcement because of its uncertainty in the particulars stated was the only conclusion that could logically or legally be drawn from the findings of fact."

Similarly, in *Booth v. A. Levy & J. Zentner Co.*, 21 Cal. App. 427, 131 Pac. 1062, where the price was left to be "agreed upon". Similarly, in *Stone Drill Corp. v. Stooddy Co.*, 4 C. A. 2d 367, 40 Pac. 2d 945, where the contract said, "It is understood that the retail prices are to be set and maintained by mutual agreement", which said the Court "in effect is no agreement whatsoever". As stated by Judge Cardozo in *Sun Printing & Pub. Assn. v. Remington Paper & P. Co.*, 235 N. Y. 338, 139 N. E. 470, 471, col. 2, "The result was nothing more than 'an agreement to agree' ". So, in *Leonard C. Pratt Co. v. Roseman* (1940), 20 N. Y. S. 2d 10, where the contract read "with the understanding that price is to be determined between us". In holding the agreement unenforceable the Court said (20 N. Y. S. 2d at 12):

" 'Price is a material element of any contract of sale, and an agreement to agree thereon in the future is too indefinite to be enforceable.' *Ansorge v. Kane*, 244 N. Y. 395, 398, 155 N. E. 683, 684. As was said by Cardozo, J., in *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co., Inc.*, 235 N. Y. 338, at page 344, 139 N. E. 470, at 471: 'Market prices in 1920 happened to rise. The importance of the time element

becomes apparent when we ask ourselves what the seller's position would be, if they had happened to fall. * * * The parties attempted to guard against the contingency of failing to come together as to price. They did not guard against the contingency of failing to come together as to time. Very likely they thought the latter contingency so remote that it could safely be disregarded. In any event, whether through design or through inadvertence, they left the gap unfilled. The result was nothing more than "an agreement to agree".' ' "

Likewise, in *Boatright v. Steinite Radio Corp.*, 10 Cir., 46 F 2d 385, where the sale was "at prices to be agreed upon from time to time" (46 F. 2d at 386, col. 2), the Court said (46 F. 2d at 389, col. 1):

"Where an essential element of a contract is reserved for future agreement of the parties, no legal obligation arises until such future agreement is concluded. *Weegham v. Killefer* (D.C. Mich.), 215 F. 168, 170; *Speirs v. Union Drop Forge Co.*, 180 Mass. 87, 61 N. E. 825; *Williston on Contract*, vol. 1, § 45.

An executory contract to sell, which provides that the price shall be fixed by future agreement between the parties, is incomplete and nonenforceable until the parties agree on the price. *Williston on Sales*, vol. 1, § 168; *Speirs v. Union Drop Forge Co.*, *supra*; *Elmore, Quillian & Co. v. Parrish Brothers*, 170 Ala. 499, 54 So. 203; *Bigger & Sons v. Johnson*, 106 Ark. 89, 152 S. W. 291."

It is to be noted in that passage that the Court cited *Williston, Contracts*, § 45, which goes to the root of the matter as follows:

“Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if something is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise. It should be observed, however, that though such a promise is invalid, it will not necessarily invalidate an entire agreement of which it forms a part. Whether it will have this effect depends upon its relative importance and its severability from the remainder of the contract of which it forms a part.”

The Court also cited *Elmore, Quillian & Co. v. Parrish Bros.*, 170 Ala. 499, 54 So. 203. Therein, the contract read, “to be agreed upon at time of delivery”; and the Court said (50 So. at 204):

“It is the duty of the courts to lean against the destruction of contracts on the ground of uncertainty. *Holst v. Harmon*, 122 Ala. 453, 36 South. 157. This is important, certainly, but another consideration of controlling importance is that courts have no right to impose contracts upon parties, and this they do when they interpolate or eliminate a term of material legal consequence in order to save them. We find it impossible to eliminate the clause in question. It follows, in our opinion, that the contract alleged in counts 2 and 4 is void for uncertainty.”

And similarly at bar, it is impossible “to eliminate” the contract provision that the price of 33,309 cases was to be subject to future “negotiations between the parties”. To

“eliminate” the provision would be to change the contract, which no Court has ever considered that it is empowered to do.

As stated in *Williston, Contracts*, § 45:

“Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.”

That passage from *Williston* is of wide application in contract law, and has been twice quoted by Appellate Courts of California and approved as sound law:

Howard v. Burrow, 77 Cal. App. 4, 8-9, 245 Pac. 808, 810;

Los Angeles Soda Works v. Southern California Aquazone Co., 103 Cal. App. 105, 108, 284 Pac. 253, 254, col. 1.

Among the cases cited by *Williston* to his § 45 is the frequently cited case of *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906, where it was said:

“An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain whether any, or, if so, what damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations.”

That passage from *Shepard v. Carpenter*, *supra*, has been twice cited and followed by Appellate Courts in California:

Dillingham v. Dahlgren, 52 Cal. App. 322, 330, 198 Pac. 832, 835, col. 2;

Toms v. Hellman, 115 Cal. App. 74, 78, 1 Pac. 2d 31, 33.

In the case of *Kerr Glass Corp. v. Elizabeth Arden Corp.*, 61 C. A. 2d 55, at page 56, it is said:

“An excellent statement of the principle relied upon by defendant is to be found in *Dillingham v. Dahlgren*, 52 Cal. App. 322, at page 330 [198 P. 832].

‘An agreement that parties will, in the future, make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties; but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon.’

Also see *Howard v. Burrow*, 77 Cal. App. 4 [245 P. 808]; *Los Angeles Soda Works v. Southern California Aquazone Co.*, 103 Cal. App. 105 [284 P. 253]; *Toms v. Hellman*, 115 Cal. App. 74 [1 P. 2d 31]. In the last mentioned case, at page 78, a number of California cases in support of the proposition are collected.”

Section 9 of the Uniform Sales Act, now Calif. Civil Code, § 1729, was copied from § 8 of the English Sales Act of 1893; and in *Benjamin on Sale*, 6th ed. (1920), page 168, and 7th ed. (1931), page 159, it was said (before the adoption of the Act in California in 1931):

“If the parties agree that the price shall be as subsequently arranged between them, no contract of sale

exists unless and until the price is fixed, for the parties have reserved to themselves an option as to the price, which is an essential element of a contract of sale, and the rule of reasonable price does not apply as the parties have impliedly excluded it."

The parties reserve to themselves the right to bargain. They do not delegate the bargaining to the members of a jury.

The cases cited by cross-appellant, at its pages 16 to 19, are not in point. In *U. S. v. Swift & Co.*, 270 U. S. 124, 70 L. Ed. 497, throughout the many months of World War I the parties had determined the price once each month, but followed a regular usage and formula. In *Kann v. Wausau Abrasives Co.*, 81 N. W. 535, 129 Atl. 374, the price was not to be subject to negotiations, but was to depend on the ascertainment of facts. In *Allen v. Sam*, 120 S. E. 808, the price was to be determined by the prices on the Cotton Exchange. In *United Lumber Co. v. Modesto*, 23 Cal. App. 2d 130, the price was to be based on the open market price of cement. In *Memphis Furn. Mfg. Co. v. Wemyss Furn. Co.*, 2 F. 2d 428, there were previous dealings and an established practice between the parties. In *Buggs v. Ford Motor Co.*, 113 F. 2d 618, the price was determined by a nationwide list price of automobiles. In *Johnson Oil Ref. Co. v. Elder*, 96 Colo. 314, 42 Pac. 2d 610, and in *Shell Oil Co. v. Wright*, 167 Wash. 197, 9 Pac. 2d 106, the prices of gasoline and oil were determined by the officially posted price current throughout an interstate region. The distinctive reasoning is clearly stated in *Buggs v. Ford Motor Co.*, supra, as follows (113 F. 2d, at 620, col. 2):

"The parties had been dealing with each other prior to the execution of the last contract. They knew of

the practices of each other. The dealer knew that automobiles were redesigned and new models appeared yearly and as a result prices changed at least seasonally. Defendant's business was nationwide and its agents were many. It was to this known situation that the contract referred. The parties negotiated with a background of past dealings and mutual knowledge of the practices of the trade. 'The net list prices and discounts from published list prices' appearing in paragraph 2 were well known to both parties. These net list prices and published list prices were the same to all dealers. They changed as necessity required. They were not lacking in definiteness, but provided a method whereby the prices could be definitely ascertained at any time."

(b) So far, we have shown that there was no enforceable contract as to the 33,309 cases. We may, however, assume *arguendo* a valid contract, but then inquire how damages could be ascertained when the parties had not yet fixed the price? That was the approach of the Court in *Watts v. Weston*, 2 Cir., 62 Fed. 136. There, the contract was for the entire output of a colliery for a period of 21 years, "at a price to be agreed upon from month to month". After performance for five years, the seller refused further performance. The trial judge directed a verdict for plaintiff in the nominal amount of "six cents only". In affirming the judgment, the Court of Appeals said:

"In our opinion, the plaintiff was not entitled to recover any but nominal damages. The agreement of June 25, 1880 bound Knevals and the colliery only to sell the New York firm coal at a price to be agreed upon between the parties from month to month. The profits of the firm would manifestly be the difference

between the price thus fixed, plus such expenses as they might be put to, and the price they might be able to obtain for the coal in the New York market. As the price to be paid the colliery was left wholly unsettled by the contract, and could be made certain only by further agreement of the parties from time to time, there is nothing, in the absence of such further agreement, with which to compare the market price at which coal, if shipped, could have been sold by the firm, and thus determine the profits which might have been lost by a refusal to sell at all. Not only is the contract uncertain as to the price to be paid by the firm, but it is not by its terms capable of being made certain either by reference to some umpire in case of a disagreement, or by providing that in the absence of an agreement it should be taken at the market price. Nor is there sufficient in the evidence to warrant a finding that the parties had practically so interpreted it as to dispense with the successive agreements as to price for which it provides. No doubt, in figuring for a coming month, both sides naturally enough took the market price of coal in the preceding months as a basis; both also took into consideration the tendency of the market for the future; but the important fact as to practical interpretation is that they did in fact from time to time agree upon the price. Neither seems ever to have acted upon the assumption that such price was to be fixed otherwise than with the concurrence of both. Moreover, it is difficult to see how, under the contract, there could be, as the plaintiff contends, any 'market price' for Primrose coal 'at the colliery'. A market implies competition, and, if the entire output was to be turned over for 30 years exclusively to a single customer, it is quite apparent that unless some control over the price was reserved to the

colliery it would be entirely at the mercy of the customer, who might fix the market at the mines by the price it was willing to pay. Nor is it to be supposed that the price to be paid was the market price of coal of its kind in New York, less expenses of transportation and sale. In the absence of a selling commission,—and the contract provides for none,—this would leave no profit to the consignees. We find nothing in the case from which a jury could determine what price the contract required plaintiff's firm to pay during any month not covered by an agreement as to price, and without that element the damages resulting from a failure to sell them coal are not susceptible of adjustment."

(c) There is an additional reason why any recovery should be limited to 26,691 cases as a basis, i.e., the contract lacked mutuality with respect to the remainder of 33,309 cases. Paragraph "Fourth" of the contract reads (*italics and brackets added*):

"FOURTH: Second party hereby agrees that the assorted quantities [26,691 cases] bottled and stored have been sampled by him and are herewith accepted in entirety, and the party of the first part assumes no further liability as to the quality of the wines, but on quantities [33,309 cases] not yet bottled it is agreed that prior to acceptance, samples will be forwarded to the party of the second part *for its approval*, and in the *event of non-approval* nothing herein contained shall prevent party of the first part from disposing of such stocks through other channels should it so desire."

In short, approval or disapproval was left wholly to the will of *Park, Benziger & Co., Inc.* By the law of California such a contract is wholly lacking in mutuality: *Charles*

Brown & Sons v. White Lunch Co., 92 Cal. App. 457, 268 Pac. 490. "Mutuality of obligations is an essential element in every binding contract", *County of Alameda v. Ross*, 32 C. A. (2d) 135, at 145, and cases there collected. (89 Pac. (2d) 460, at 465.)

Cross-appellant attempts to overcome the defect of lack of mutuality by an argument, at its pages 20, 21 and 22, about tender and acceptance of samples on the future 33,309 cases of wine. It claims, at its page 21, that a standard for tender and acceptance was set out in the written modification dated February 3, 1943, Plaintiff's Exhibit 2. (Annexed as Appendix B to the Opening Brief for Appellants on the main appeal.)

The argument for cross-appellant is based upon the false premise that "the wine is represented as being of a certain quality" (their page 20) and on their next page, 21, they assert that "the standard was set forth with particular care in the modifying letter attached to the contract". The trouble with those assertions is that they are simply false. All that the "modifying letter" of February 3, 1943, says about the matter is that the 26,691 cases then in existence "are to the best of our knowledge vintage wines of 1937 and 1938" and that they were "produced and bottled by the California Wine Association". That is merely a description of wine then in existence. The 33,309 non-existing cases are not described and no standard is set for them, and we do not see how, by any stretch of the imagination, it can be said that when those 33,309 cases came into existence in the year 1945, they were to be filled with bottled wines of the "vintage" of "1937 and 1938". As to quality, nothing is said in the contract either as to the 26,691 cases or

the 33,309 cases; and outside the contract the evidence shows nothing ever said about quality. The defendants had never dealt in wine before, the plaintiff had never bought wine from the defendants before, and indeed the evidence indicates that the plaintiff's previous dealings in wine had been as an importer of foreign wine, and this venture of theirs in California wine was something new. The situation clearly distinguishes from the case of *Goodlove v. Russell*, 184 Or. 445, 293 Pac. 936, 937, cited and quoted at page 21 of cross-appellant's brief. In the report of that case the following statement is made by the Court immediately *preceding* the passage quoted by the plaintiff:

"The quality of the eggs is defined as not undersized, thin-shelled, or misshapen, and none of them were to have been subjected to a temperature of less than 50 degrees nor more than 70 degrees."

It will be seen that what the Court was talking about was a specifically stated and defined standard of hatching eggs from a flock of 60 identified turkey hens then owned by and in the possession of the seller on his farm in Oregon.

II.

THIS BRANCH OF CROSS-APPELLANT'S BRIEF IS MERELY AN AFTERTHOUGHT.

The proposition argued by cross-appellant under its heading II is based upon what it calls, at the top of page 23 of its brief, its "second ground of cross-appeal", which is followed there by a quotation from R. 549 from which it appears that cross-appellant is merely quoting the second "point" contained in its Statement of Points. A

statement of points is not the genesis of an exception, but is simply a document permitted under Rule 75(d) FRCP when an appellant does not desire to bring up "the complete record" but desires to have transcribed and printed something less than "the complete record", and the Statement is simply an indication to the appellee of what may be safely omitted from the transcript of record in the appellee's cross-designation of matter to be contained "in the record on appeal", Rule 75(a) FRCP. In a parenthesis at page 23 of its brief, cross-appellant tells the Court to "see appendix for requested instructions and exceptions preserving this issue", but when that appendix has been read, and indeed when the whole of the transcript of record has been read, it will be seen that cross-appellant never at any time during the trial raised, or had ruled upon, or brought to the attention of the trial Court, the *specific* contention that it now seeks to make. All that was ever before the trial Court was the main question whether the parties had ever agreed upon a price covering more than the stock of 26,691 bottles of wine on hand when the contract was made. If, instead of cross-appellant's present afterthought, it had desired during the trial to give to the jury as the basis of their award the number of cases reached by multiplying a carload of 1500 cases by the number of monthly carloads from the time delivery was to begin until the end of 1944, instead of using a basis of either 60,000 cases or 26,691 cases, cross-appellant should have presented the matter through a specific request for a specific instruction. The Court below could then, under Rule 51 FRCP, have informed counsel "of its proposed action upon the request" prior to the argument to the jury, and thereupon this particular

matter could have been argued before the jury. When one reads the top paragraph of page 25 of cross-appellant's brief, one sees that it is simply a jury argument claiming for the plaintiff that the award of damages should have been based upon 37,500 cases. It could have been argued to the jury that that figure of 37,500 is far-fetched: (a) In what month was the first carload to be shipped? By the end of April 1943 cross-appellant had not yet printed the labels. When would the labels have been printed? When would they have been shipped from New York to San Francisco and become available to cross-appellees for putting on the bottles? When would cross-appellant have decided upon the printing or marking to be placed on the outside of the cartons in which the bottles were to be packed and shipped? How long thereafter in these days of war priorities would it then take cross-appellees to have had such cartons manufactured and thus marked? (b) Would the jury have found that the parties to the contract meant by the phrase "additional quantities for the holidays" to include Thanksgiving as cross-appellant now suggests, or merely the Christmas-New Year holidays? Moreover, since an extra "holiday" carload was merely optional with cross-appellant, would it have exercised the option?

Cross-appellant now reaches 37,500 cases apparently as a matter of law. The jury might have decided upon no more than 26,691 cases as a matter of fact.

Furthermore, as we have demonstrated under heading I, *supra*, prices were never agreed upon for more than the 26,691 cases submitted to the jury as a basis. The specific prices per case mentioned in the contract related only to 26,691 cases, i.e., "the quantities now bottled and stored"

and the prices were "for this block of merchandise", the block of 26,691 cases.

III.

THE COURT BELOW DID NOT ERR IN EXCLUDING EVIDENCE OF SALES BY CROSS-APPELLEES SUBSEQUENT TO APRIL 27, 1943.

The Court below excluded evidence of sales by cross-appellees on dates subsequent to the date of breach, April 27, 1943. The dates and prices of subsequent sales were as follows:

<u>1943</u>	<u>Price per case</u>
June 19	\$6.50
July 17	6.00
21	6.00
22	6.00
23	6.00
24	7.00
Aug. 13	7.00
20	7.00
	6.50
27	7.00
Sept. 1	6.50
15	7.00
17	7.00
22	7.00
Oct. 29	7.50
Nov. 11	7.50
12	8.50
13	8.50
15	8.50
19	7.50
22	8.50
<u>1944</u>	
Feb. 26	8.50

There was no error in the ruling, for several reasons:

(a) The contract prices per case for deliveries during 1943 were \$5.25 for dry wines, and \$6.00 for sweet wines. The above list of sales at varying prices from \$6.00 to \$8.50 per case exceeded the contract price of \$5.25 to the extent of 75 cents to \$3.25 per case. The damages of \$72,687.50 awarded for 22,191 cases (26,691 minus 4,500) amount to \$3.27 per case. If there was error in excluding the evidence, it was harmless; indeed, it was beneficial to cross-appellant, because the excess of proceeds of sales above the contract price was much less than the amount of the verdict.

(b) The argument of cross-appellant is founded on confusion. It argues (its page 26) that sales by cross-appellees "were admissible as an alternative measure of damages, as was held at the first trial". That goes outside the present record but needs reply. At the first trial there was a trial issue for the jury whether the wine could be obtained elsewhere in the market, and hence they were instructed in the alternative, to use one measure or the other, depending on their finding that the wine was or was not available elsewhere. That trial issue was not present in the second trial, but without objection the Court below charged the jury, R. 520:

"I instruct you that the evidence before you is insufficient to show that the goods were obtainable elsewhere, that is, it is insufficient to show an available market. On the contrary, it shows no available market."

Therefore, the present record negatives any basis for the alternative of "market value".

In *Richter v. Clark*, 60 Atl. 741, the claim of a buyer of coal for loss of profits on resales was denied, because the coal was available elsewhere in the market, and the Court said (60 Atl. at 742, col. 1):

“The coal could easily have been replaced by purchasers from others, with the same opportunity for profit on resales.”

As stated in 46 *Am. Jur.* 803:

“The rule allowing such damages [the difference between the agreed price and the market price] is based on the assumption that full indemnity is thereby offered to the buyer, for by going into the market he may procure the commodity contracted for, charging the seller with the difference in price, if any. This rule applies where there is a ready market for the goods purchased of goods like them, but does not apply where there is not such a market.”

Further, 46 *Am. Jur.* 811:

“Where there is not a ready market for the goods purchased, the **reason** for the rule allowing the recovery of the difference between the contract and market prices **ceases**, and the rule has no application.”

Market price implies the existence of a market, of supply and demand, of sellers and buyers, *Heiner v. Crosby*, 3 Cir., 24 F. 2d 191, 193. The term “market value”, as the words fairly import, indicates price established in a market where the article is dealt in by such a multitude of persons, and such a large number of transactions, as to standardize the price; individual dealings are not competent to prove it, *North American Tel. Co. v. Northern Pacific Ry. Co.*, 8 Cir., 254 Fed. 417, 418. A casual sale does not establish a market, *Le Blume Import Co. v. Coty*,

2 Cir., 293 Fed. 344, 351. Market price is not an imaginary fictitious thing, but is the price at which goods are actually being sold in the market at the time or times in question, *Birdsong & Co. v. Marty*, 163 Wis. 516, 158 N. W. 289, 292, col. 1. A market cannot be considered available unless the buyer can satisfy his needs therein, *Empire Box Corp. v. Jefferson Island Salt Mining Co.* (Del.), 36 Atl. 2d 40, 46; *Abrams v. C. Schmidt & Sons*, 17 Atl. 2d 681, 684.

The confusion in which cross-appellant's argument is founded becomes worse at its page 28, where it quotes from 55 *C. J.* 1161 a passage about determining value "by the advanced price at which the *buyer* has agreed to sell them", etc. That passage occurs in Sales, § 1149, in the course of the Corpus Juris treatment of Remedies of *Buyer*, §§ 1054-1167, and is utterly irrelevant to sales by a *seller*.

Cross-appellant's argument is pregnant with further confusion in treating a *seller's* profit as coinciding somehow with a *buyer's* loss of profits. The terminology is cleared when we keep in mind that "gain prevented is a more accurate term than loss of profits", *Eckington & Soldiers' Home R. Co. v. McDevitt*, 191 U. S. 103, 113. It is a question of the buyer's gain prevented, not of a seller's profit made.

(c) Finally, even though it be assumed that evidence of sales was admissible, there was a fatal defect in cross-appellant's proffer, because it embraced sales over a range of ten months subsequent to April 27, 1943. The claim of cross-appellant is based upon a repudiation or anticipatory breach occurring on April 27, 1943, of a contract calling for deliveries in monthly installments over a period of years. That repudiation did not affect cross-

appellant unless it voluntarily *elected* to treat the repudiation as a breach. As said in *New York Trust Co. v. Island Oil & Transport Corp.*, 2 Cir., 43 F. 2d 923, 927, col. 2:

“But aside from this, the claim of damages for the period from March 20, 1922, is based upon an anticipatory breach due to the appointment of the receivers of the transport company. The breach only affected the refining company if it elected to treat it as a breach. It never evidenced any such election so that, as regards itself, no breach existed. *Central Trust Co. v. Chicago Auditorium Ass’n*, 240 U. S. 581, 60 L. Ed. 811, L.R.A. 1917B, 580; *Samuels v. E. F. Drew & Co.* (C.C.A.), 292 F. 734; *Johnstone v. Milling*, 16 Q. B. 461, at page 467.”

If a buyer elects not to treat the repudiation as a breach, then the contract stands, and each of the subsequent failures to deliver constitutes, for the purpose of determining market value, a separate and distinct breach. As said in 46 *Am. Jur.* 805:

“Where the goods are to be delivered by instalments, and there is a failure to deliver two or more, or all of the instalments, the proper measure of damages is the sum of the difference between the contract and market prices of the quantity of each instalment not delivered at the respective times of delivery, and the place of delivery, each of the failures to deliver constituting for this purpose a separate and distinct breach.”

However, before any deliveries began, indeed before cross-appellant supplied any labels or gave any shipping directions so that deliveries could begin, cross-appellant *elected* to treat the occurrences on April 27, 1943, as a repudiation or anticipatory breach *on that date*, and filed its complaint in this action 22 days afterward, on May 19, and in para-

graph X laid its claim on a repudiation occurring on April 27, 1943.

There is much confusion and discord in the decisions in England and America with respect to the date for measurement of damages where there is an "anticipatory breach" of a wholly unexecuted contract of sale. Under the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Six Companies v. Joint Highway District*, 311 U. S. 180, 85 L. Ed. 114, the local rule is to be followed, and the local rule is found in *Lompoc Produce & Real Estate Co. v. Browne*, 41 Cal. App. 607, 183 Pac. 166. That was an action by a buyer against a seller for damages for repudiation or anticipatory breach of a contract for the sale of a crop of beans. Deliveries were due on or before November 1. The seller repudiated the contract on October 18. Complaint was filed on October 25. We have examined the transcript and briefs, which show that the evidence of market value was over objection confined to the market on October 18, when the beans had a market value of \$12.00 per hundredweight, even though the market had fallen by the day the complaint was filed, on October 25. The trial Court instructed the jury as follows:

"You are instructed to ascertain the quantity of beans recleaned which should have been delivered by defendant to plaintiff, under the contract in suit. Having so ascertained said quantity of beans recleaned, the measure of plaintiff's damages which you are to determine is the excess of value of said beans on the 18th day of October, 1917, at Salinas City, California, over the contract price thereof, namely, \$7.75 per hundred pounds."

On appeal, the date of the repudiation was treated as "the time of the breach" and it was accordingly ruled that the trial Court had correctly used the market on the repudiation day of October 18 in measuring the damages, the Appellate Court saying:

"We think that the absolute refusal of the defendant to perform conferred upon the plaintiff an immediate right of action. *Garberino v. Roberts*, 109 Cal. 126, 128, 41 Pac. 857; *Stum v. Hadrich*, 7 Cal. App. 242, 244, 94 Pac. 82; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Central Trust Co. of Illinois v. Chicago Auditorium Ass'n*, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L.R.A. 1917B, 580; *Cabrera v. Payne*, 10 Cal. App. 675, 678, 103 Pac. 176. The market value of the beans at the time of the breach was a proper measure of damages. *Masterson v. Mayor of Brooklyn*, 7 Hill (N.Y.) 61, 42 Am. Dec. 38, quoted with approval in *Hale v. Trout*, 35 Cal. 229, at page 243; *Roehm v. Horst*, 178 U. S. 1, at page 21, 20 Sup. Ct. 780, 44 L. Ed. 953."

Turning to the cited page 21 of the report in *Roehm v. Horst*, we find that it is there said:

"Although he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain."

That passage gives a reason for the rule which uses the date of repudiation as the date for measuring the damages. Turning also to the cited page 243 of the report in *Hale v. Trout*, we find it said:

“When the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages.”

Clearly, therefore, the rule in California is that when the plaintiff elects to sue immediately upon the repudiation, that election carries with it a correlative election to treat the day of repudiation as the day of breach.

The cross-appellant apparently contends that under Civil Code, § 1787(3), it was entitled to prove the successive market values from April 27 to the time of trial. We make alternative replies:

1. The section is from § 67 of the Uniform Sales Act, which was copied from § 51 of the English Sale of Goods Act (1893); and it has been ruled in England that the section was not intended to apply, and does not apply, to a case of anticipatory breach, *Millett v. Van Heck & Co.* (1921), 2 K. B. 369. If that be so, then the law of California has been left unchanged, and the case is ruled by *Lompoc Produce & Real Estate Co. v. Browne*, 41 Cal. App. 607, 183 Pac. 166, *supra*.

2. If the section does apply to a case of repudiation or anticipatory breach, then under the section the damages would be measured by the market

“at the time or times when [the goods] ought to have been delivered, or if no time was fixed then at the time of the refusal to deliver”. (Civil Code, § 1787(3).)

The first inquiry, therefore, is whether "*the time was fixed*" for deliveries. The contract does not fix times of delivery. It states a *rate* of delivery, i.e., "at the rate of one carload each and every consecutive month thereafter for the next three years during the month of February, 1943, and continue thereafter as stated up to the year 1945" with an option to the buyer for an additional car "for the holidays". (Contract, par. Second.) Before any shipment, however, the plaintiff was to prepare and supply its own labels. (Contract, par. Eighth.) The plaintiff would have to give shipping instructions before the defendants could make any shipments. In other words, before any "delivery" or any "time for delivery", each carload would have to be preceded by instructions from the plaintiff as to which and how many cases to put in the car and how and to whom and where to consign the car. Indeed, up to April 27 no such instructions had been given, nor had labels been delivered. In the light of the foregoing we have, then, a contract in which "no time was fixed". In the one American case under this part of the Sales Act, *Phillips Sheet & Tin Plate Co. v. W. W. Boyer & Co.*, 133 Md. 119, 105 Atl. 166, the contract was for 5000 boxes of tin plate. The contract said (105 Atl. at 167, col. 1):

" 'Time of delivery: In approximately equal monthly quantities; each month's delivery to be treated and considered as a separate contract during the year 1916. Specifications: To be given at least 60 days in advance of shipping date.' "

Since the contract was made in December, 1915, shipment could not begin until the month of February, 1916, and the

Court construed it as a contract to ship one-eleventh of 5000 cases, i.e., 454½ cases, per month, February to December, 1916. By a letter of April 19, 1916 (quoted, 105 Atl. 168, col. 2), the seller repudiated the contract as to 2080 cases, i.e., all but 2920 of the 5000 cases. There was a steadily rising market in tin plate through the year 1916, and the trial Court admitted evidence of market prices throughout the period subsequent to the month of April; and in reversing the case, the Court of Appeals said:

“The measure of damages under the Uniform Sales Act (article 83, § 88 of the Code) we think should have been ‘the difference between the contract price and the market or current price of the goods * * * at the time of the refusal to deliver’; there being no special circumstances showing proximate damages of a greater amount, and **there being no time fixed for the delivery when the refusal to deliver took place.** There was therefore error in the thirty-third exception in not granting the motion of the defendant to strike out the evidence of Mr. Thompson and so much of Exhibit No. 42 referred to and incorporated therein as purports to give **the market price of tin plate subsequent to the month of April, 1916;** that evidence having been admitted subject to exceptions.”

That case parallels the case at bar. In our case, it is equally true that there was “no time fixed for the delivery *when the refusal to deliver took place*”. Our refusal occurred on April 27, and up to and including that date no shipment had been ordered, no shipping instructions had been given, and no labelling had been done.

3. There is perhaps no greater confusion in contract law than in that branch of it that has to do with the doc-

trine of repudiation or anticipatory breach. Much of the confusion is chargeable to Prof. Williston, because of his inability in the matter of logic to justify the bringing of a suit for damages for nonperformance of a promise before the time for performance had arrived. In the year 1901, he initiated polemical literature upon the subject with his essay, "Repudiation of Contracts", published in 14 Harvard Law Review, 317 and 421. In his subsequent texts in the law of Contracts and of Sales, he merely repeated his earlier polemical attack upon the doctrine. He seems to have been much encouraged in his position through non-acceptance of the doctrine in his own State of Massachusetts wherein the law school in which he taught for so many years was located, notwithstanding that Massachusetts has ended in unenviable solitude upon the question. After he published his polemic in 1901, a great controversy began raging, and the principal contributions to the subject were collected and published in 1931, in Chapter IX, "Anticipatory Repudiation", under the book title "Selected Readings on the Law of Contracts from American and English Legal Periodicals". The principal argument against the Williston view turned out to be that he was simply talking about the breach of an *express* promise in a contract, and all his difficulties of logic disappear as soon as it is realized that a suit brought immediately upon repudiation of an executory promise to be performed in the future, is in truth and reality not a suit for breach of an express promise performable thereafter, but is simply a suit brought at once at the time of breach of a present *implied* promise not to repudiate; and, finally, Prof. Williston arrived at an understanding of that as the true logical

basis of the doctrine. We quote the following editorial note, which appears at the bottom of pages 1071 and 1072 of the Selected Readings, supra:

“In an address published in (1924) 71 N. L. Law Jr. 1128, 1142, Prof. Williston, while reiterating his objection to the doctrine of anticipatory repudiation, recognized that its commercial convenience had led to its adoption in most jurisdictions and added (p. 1142): ‘In jurisdictions where this is true, I should be in favor of extending the doctrine rather than limiting it * * * I should advocate the adoption of a broad principle that every contract includes as an implied obligation a promise not to repudiate. I should then hold such repudiation a breach of contract like any other breach—requiring no election or immediate action in reliance upon it to help it out.’—Ed.”

That admission by him in the year 1924 was, of course, long after the publication in 1909 of his book on Sales and the publication in 1920 of his book on Contracts, with the result that his treatment of the doctrine in those books was polemically designed to create confusion rather than to solve it. It is the clear rule in California “that that which is implied by law becomes as much a part of the contract as that which is therein written”, *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 750, 103 Pac. 938, 939, col. 2 bottom, and 940, col. 1 top; 6 Cal. Jur. 318, § 189. Undoubtedly, the sound basis of the decision in *Lompoc Produce & Real Estate Co. v. Browne*, 41 Cal. App. 607, 183 Pac. 166, is that the “breach” therein mentioned by the Court was a breach of a present *implied* promise not to repudiate and, that being so, the Court simply laid down a rule for measuring the damages for

breach of such a promise, the rule being that they are to be measured as of the market on the day of breach, i.e., the day of repudiation. It further follows therefrom that since the Sales Act deals solely with the measurement of damages for breach of an express promise to perform, the Act contains no rule for measuring the damages for breach of an *implied* contract not to repudiate; in consequence of which the case at bar is governed by *Lompoc Produce & Real Estate Co. v. Browne*, 41 Cal. App. 607, 183 Pac. 166.

Dated, San Francisco,

December 26, 1944.

Respectfully submitted,

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LOUIS H. BROWNSTONE,

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Pierre Bercut and Jean Bercut.

No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individ-
ually, and as Copartners doing business
as P & J Cellars (a copartnership),

Appellants,

vs.

PARK, BENZIGER & Co., INC. (a corporation),

Appellee,

and

PARK, BENZIGER & Co., INC. (a corporation),

Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individ-
ually, and as Copartners doing business
as P & J Cellars (a copartnership),

Cross-Appellees.

CROSS-APPELLANT'S REPLY BRIEF.

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ually, and as Copartners doing business
as P & J Cellars (a copartnership),

Cross-Appellees.

CROSS-APPELLANT'S REPLY BRIEF.

Cross-appellees have filed a brief which gives the impression that counsel took a quick glance at our brief, and then attempted to write a reply without

having really read either cross-appellant's brief or the relevant law.

We answer counsel's points in order.

I. THE CIRCUIT COURT OF APPEALS HAS JURISDICTION OF THE APPEAL.

Counsel first object to the jurisdiction of the Circuit Court of Appeals, on the ground that we appealed from a portion of the judgment.

A. It is claimed this cannot be done in the absence of statute, and counsel assert "we know of no act of Congress permitting it". For counsel's edification we quote part of Rule of Civil Procedure 73(b):

"The notice of appeal * * * shall designate the *judgment or part thereof* appealed from * * *."
(Italics added.)

The Rules of Civil Procedure were authorized by Act of Congress (28 USCA 723b, 723c) and have the force of statute. (28 USCA 723b.)

Carter v. Powell, 104 Fed. (2d) 428, 430, 431, confirms the right under this rule, to appeal from part of a judgment.

The intention of the notice of appeal is clear. A judgment for the plaintiff decides two things: (1) liability, (2) amount of damages. Plaintiff obviously does not want to appeal from the favorable decision on the issue of liability. Had it done so defendants

would probably have moved to dismiss the appeal as being taken from a judgment in favor of cross-appellant. (Cf. *Galloway v. Gen. Motors Acc. Corp.*, 106 Fed. (2d) 466, cited at page 3 of cross-appellees' brief.) This last cited case, taken together with *Carter v. Powell*, *supra*, is decisive in cross-appellant's favor. The two hold *first* that the new rules generally authorize appeal from part of a judgment; *second*, that appeal from the part awarding damages is proper where judgment is for the plaintiff but the plaintiff wants to question the amount of damages.

B. Counsel also make two specific contentions.

1. First they claim that the right to appeal from "part of a judgment" applies only to a definitely severable part. But *Galloway v. Gen. Motors Acc. Corp.*, 106 Fed. (2d) 466, would seem to answer this despite cross-appellees' attempts to distinguish the case.

Bank of Visalia v. Curtis, 131 Cal. 178, is also cited to this point at page 3. In the first place, it is a state case and therefore not in point. In the second place, its holding is distinguishable. It was decided in 1901—at a time when California procedure still allowed an appeal from an order denying a new trial in civil cases. The opinion (131 Cal. 178, 179) says that the appellant's point could have been raised on a motion for a new trial (and therefore on appeal from denial of a new trial) rather than on appeal from the judgment. An appeal from part of the judgment did not change this. If California decisions are relevant, the

latest on the subject is *Adams v. Talbott*, 20 Cal. (2d) 415, 417. It holds that notices of appeal are liberally construed to secure a hearing on the merits.

Under the above authorities cross-appellant's procedure was correct. A plaintiff, appealing from a partial judgment in his favor, appeals from that part relating to the issue of damages.

2. Counsel also claim that our specific points cannot be argued *first*, because they are intermediate rulings, and *second*, because they were not specifically named in the notice of appeal. (Cross-Appellees' Br. pp. 3-4.) But an appeal from a final judgment brings up for review all intermediate rulings which produced the judgment:

Roth v. Hyer, 142 Fed. (2d) 227, 228 (CCA 5).

"The final judgment (or such interlocutory one as may be appealed from) is the judgment to be designated under Rule of Civil Procedure 73(b); but *the appeal draws in question all rulings of the court that produced the judgment.*" (Italics added.)

The present cross-appeal taken from the judgment relating to damages, draws in question all rulings upon the issue of damages.

C. *Summary.* The Circuit Court of Appeals has jurisdiction of the cross-appeal. The notice appealed from the judgment insofar as it fixed damages. That was the only part of the judgment from which the plaintiff *could* appeal. It drew into question all rulings upon the issue of damages.

II. ISSUE OF DAMAGES SHOULD HAVE BEEN SUBMITTED UPON BASIS OF 60,000 CASES.

This subdivision deals with the construction of the contract between the parties, primarily with clause Third.

A. In our opening brief we said that defendants (cross-appellees) stressed the words "subject to negotiations between the parties" to the exclusion of all the rest of the contract. (Cross-Appellant's Op. Br. pp. 9, 12.) Defendants now confirm our statement. On cross-appellees' brief, page 5, they quote the last paragraph of clause Third, but print the word "negotiations" in bold-face type. On page 6 they give their interpretation:

"* * * the contract is not silent, but instead shows how the price is to be arrived at: it is to be 'subject to negotiation between the parties'."

In short counsel treat this language as controlling, regardless of the remainder of the contract. *They want the phrase "subject to negotiations between the parties" construed independently of its context.*

To state the proposition is to refute it.

On pages 10-15 of cross-appellant's opening brief we gave a detailed analysis of the contract as a whole and especially of clause Third. We showed that the correct interpretation of the word "negotiations" was—"calculations of future cost levels". (Cross-Appellant's Op. Br. p. 20.)

Defendants do not mention much less try to answer this analysis. They do not even give evidence of hav-

ing read that part of our brief. At pages 10 and 11 they try to answer what they seem to believe might be our contention. They draw our conjectural position from their own imagination, instead of getting our real position from our brief. Cross-appellees say:

“and similarly at bar it is impossible ‘to eliminate’ the contract provision that the price of 33,309 cases was to be subject to future ‘negotiations between the parties’.”

This quotation reiterates cross-appellees’ attempt to take the words “subject to negotiations” out of their context. But if counsel had read our brief, they would know that we have never tried to “eliminate” their language. Instead we have tried to show its relation to the rest of the contract (Cross-Appellant’s Op. Br. pp. 10-15) and the proper meaning which it takes on when read in the light of surrounding provisions. As stated above, this meaning is “calculations of future cost levels”.

B. Defendants not only do not answer this analysis but disregard it in their discussion of legal authorities.

1. All the authorities which they cite in their own behalf (Cross-Appellees’ Br. pp. 6-12) are cases where the contracts provided for negotiations *and nothing further*. These cases might be in point if counsel were correct in their implied contention that the present contract contains nothing more on the subject than the words “but subject to negotiations between the parties”. As we have shown the contract contains much more and is much more specific. Since counsel’s treat-

ment of the facts is incorrect, their cases are likewise inapplicable.

2. The same thing is true of cross-appellees' attempts to distinguish plaintiff's citations. This is particularly true of *Kann v. Wausau Abrasives*, 81 N. H. 535, 129 Atl. 374, as to which counsel say "the price was not to be subject to negotiations, but was to depend on the ascertainment of facts". (Cross-Appellees' Br. p. 13.) In the present case we have shown that *subsequent clauses of the contract limit "negotiations" to such an extent as to make the word equivalent to ascertainment of facts.*

Similarly the circumstance that the prices in *Allen v. Sams*, 120 S. E. 808, were to be fixed from the Cotton Exchange or from any other method of determining future prices would be a distinction only on the theory that the present contract is governed by the words "subject to negotiations" to the exclusion of all the rest of its text. But, as we have shown the contract really contemplates calculation of future cost levels. These may be obtained from price indexes similar to quotations upon the exchange, or directly from exchange quotations. So when the contract in the instant case is given its true interpretation, it contemplates ascertaining prices in a manner substantially like that in *Allen v. Sams*.

U. S. v. Swift & Co., 270 U. S. 124, 70 L. Ed. 497, was not based upon regular usage and formula in the past. Its *ratio decidendi* is contained in the passage quoted on pages 16-17 of cross-appellant's opening brief.

Counsel's attempts at distinguishing our other citations (Cross-Appellees' Br. p. 13) likewise do nothing more than to point out that in those cases prices were to *be fixed from ascertainable facts*. But once it is recognized that the 1945 prices in the present contract were to be fixed from ascertainable facts, this point becomes a point of similarity rather than of distinction.

C. The crux of this part of the case is whether the words "subject to negotiations between the parties" should be read by themselves, or whether they should be read together with the rest of the contract. On pages 10-15 of our opening brief we showed that the words should be read together with the rest of the contract and also showed the specific meaning which they took on when this was done. *Cross-appellees leave this section of our brief unanswered*. They confine themselves to arguments based upon the *assumption* that the phrase about negotiations is alone controlling. Since that is not true, and since our analysis of the contract remains unchallenged, the construction developed by our brief (pp. 10-15) must be accepted. In short, the broad word "negotiations" is defined by the specific provisions which follow it. Thus defined, it means simply "calculations of future cost levels", and comes within the rule of the cases cited by plaintiff. (Cross-Appellant's Op. Br. pp. 16-19.) The price for the unbottled part of the wine was therefore fixed definitely enough and the Court should have instructed on the basis of 60,000 cases.

D. On pages 14-16 counsel try to build a separate section upon the case of *Watts v. Weston*, 62 Fed. 136. In the first place, this case merely states defendants' original contention in a different way. Instead of saying that where the price is left wholly to future negotiations, the contract is void for lack of a price, it says that where there is no determinable price, there is no basis for calculating damages. (See comment on *Watts v. Weston* in *Crichfield v. Julia*, 147 Fed. 65, 72. The Second Circuit decided both cases.) Like cross-appellees' other cases it is based on the assumption that there is no ascertainable price. We have shown the contrary. Under the present contract as properly construed, this case is just as irrelevant as defendants' other cases.

E. At pages 16-18 cross-appellees return to the arguments which we mentioned at pages 20-22 of our opening brief. Cross-appellees' contentions are two-fold.

On the one hand they say (p. 17):

"They (cross-appellants) assert that 'the standard was set forth with particular care in the modifying letter attached to the contract'. The trouble with those assertions is that they are simply false. All that the 'modifying letter' of February 3, 1943 says about the matter is that the 26,691 cases then in existence 'are to the best of our knowledge vintage wines of 1937 and 1938, and that they were produced and bottled by the California wine association'. *That is merely a description of the wine then in existence.*" (Italics added.)

See also cross-appellees' brief, page 18, attempting to distinguish *Goodlove v. Russell*. Here counsel seem to think that the controlling point is whether the modifying agreement (R. 82-3) set a standard of quality or merely contained a description. Assuming this criterion to be sound, it does not benefit the cross-appellees. For both the specific provisions of the instrument and general principles of construction support the construction that the modifying agreement was intended to make representations of quality.

In the first place, the amendatory agreement was *specially drafted* on February 3 (R. 82), five days after the main contract had been drawn up. It is unlikely that the parties would have gone to this extra trouble merely to describe wines about whose identity there was not the slightest question. The fact that the agreement of February 3 was sent as a supplement indicates that it was meant to contain *representations* not included in the original contract. This is particularly clear from its third clause (R. 82) which forms a basis for labelling by plaintiff:

“That the wines purchased have been produced and bottled by the California Wine Association *and that an inscription bearing these words can be placed upon the labels.*” (Italics added.)

In other words, a representation is made in reliance on which the buyer could draw his labels. Thus the modifying agreement itself indicates it was intended as a representation and not merely as a description.

In the second place, the modifying agreement, like the main agreement, was drafted by the defendants.

(R. 82-3.) It is subject to the same rules of interpretation mentioned in our opening brief; it must be construed (a) in favor of validity and (b) against the defendants.

So if its validity depends upon whether the statements in the modifying agreement constitute representations or mere descriptions, we must take the alternative making for a valid contract. According to defense counsel the alternative which makes the contract valid is construing the letter of February 3 as a series of representations.

On the other hand, counsel make the general argument that contracts are not valid if they leave one side free to perform or not to perform as he chooses. *Brown & Sons v. White Lunch Co.*, 92 Cal. App. 457, and *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 145, are cited. Both of these cases state mere general principles. They were not concerned with *approval by the buyer*. Consequently they do not touch the proposition that the right of disapproval cannot be exercised capriciously and therefore does not give the buyer an uncontrolled right of rejection. See quotation from *Goodlove v. Russell*, 184 Ore. 445, 293 Pac. 936, at cross-appellant's opening brief, pages 21-22.

This holding is again fortified by the rule that a contract must be construed to give it validity.

Since the contract was definite both as to price and in its preacceptance provisions, it was error to withdraw the unbottled wine from the consideration of the jury.

**III. ALTERNATIVELY THE COURT SHOULD HAVE INSTRUCTED
ON BASIS OF THE QUANTITIES SOLD IN 1943 AND 1944.
(Cross-Appellees' Br. pp. 18-21.)**

Section II of cross-appellees' brief indicates that they have read neither our brief nor the record.

A. They complain that our alternative position on number of cases is an "afterthought" and that the point was never made at the trial.

On the contrary, the point was made in plaintiff's requests for instructions 1A, 15A and 16A all of which the Court refused, and to the refusal of which the plaintiff excepted. Each of these three requests, as well as plaintiff's exceptions, are printed in the appendix to cross-appellant's opening brief:

1A is at pages i-ii;

15A is at page iii;

16A is at page v.

The Court's announced refusal to give these instructions is printed at page viii and the exceptions at pages viii-ix. Plaintiff's Instruction 1A is typical and we quote the introduction and last paragraph:

"(If Instruction No. 1 is not given as is *respecting number of cases* plaintiff proposes the following *alternative* instruction):

* * * * *

"The plaintiff sues for damages for said alleged anticipatory breach of defendants' contract to sell and deliver *one carload a month during the years of 1943 and 1944 and one additional car per month during the holidays of said years if so desired by plaintiff.*" (Italics added.)

Plaintiff's request No. 1 had asked the Court to tell the jury that the suit was for failure to deliver 60,000 cases of wine. The above request was an alternative, and poses the alternative theory discussed on pages 22-5 of our opening brief. The same is true of requests 15A and 16A.

B. Counsel argue (Cross-Appellees' Br. p. 20) that we claim the issue should have been submitted on a basis of 37,500 cases *as a matter of law*. A mere reading of our proposed instructions 1A, 15A and 16A is a sufficient answer. The instructions follow the language of the contract. The result in figures was a matter of argument to the jury (as counsel correctly suggest). We made the calculation in our brief in order to show the substantive importance of the point.

C. But counsel spend the greater part of their page 20 in arguing that an application of this part of the contract to the evidence *presented a question of fact for the jury*. They take considerable pains to demonstrate their point.

Such an argument is a virtual confession of error. If there is a question of fact as to how many cases were covered by the 1943 and '44 prices, then *it was clearly erroneous to tell the jury that they were limited to 26,691 cases as a matter of law*. (Cf. Defense Request No. 38 quoted at Cross-Appellant's Op. Br. p. 7.)

Finally at pages 20-21 counsel argue for a construction which would limit the fixed prices to the bottled cases, rather than extending them to all wine sold

until the end of 1944. The most that can be said for this is that it presents an alternative construction to the one set forth on pages 23-5 of cross-appellant's opening brief. But defendants are again faced with the rules that contracts must be construed *in favor of validity* and *against the party who drafted the instrument*. Under this rule the clause must be held controlling which fixes definite prices "*during the year 1944*".

This circumstance, together with defendants' own insistence that the number of cases involved a question of fact, shows that the Court erred in limiting the number to 26,691.

IV. EVIDENCE OF DEFENDANTS' SALES SHOULD HAVE BEEN ADMITTED. (Cross-Appellees' Br. pp. 21-33.)

On pages 25-34 of the opening brief on the cross-appeal, we showed that the Court should have admitted evidence of the prices which defendants (sellers) obtained when they sold the wine to third parties. Counsel's attempted reply smacks of not having read our briefs. We answer defendants' sub-points in order:

A. *Prejudice from Exclusion.*

In the first paragraph of their page 22, counsel say that exclusion of their resale prices was harmless, because the verdict on that basis would have been less. In the first place, this is figured upon only 22,191 cases which we do not admit to be correct. It is enough to say that we do not agree that 4500 cases should be

deducted as a matter of law, or at all. On a basis of 26,691 cases, defendants resale prices support a higher verdict than the one rendered.

But the main point goes deeper. We have always thought that defendants' "strategy" in this litigation was to try to knock out one measure of damages after another, in the hope of ultimately leaving the plaintiff without any. And that in a case where there is plenty of evidence showing both a breach and injury to the plaintiff.

On the first motion for new trial defendants knocked out (in the trial Court) the measure of damages based upon their own resales; on this appeal they are trying to knock out the measure based upon plaintiff's loss of profits. As we stated in our opening brief, the cross-appeal was taken only to protect plaintiff in the event of a third trial. It keeps alive the issue of the first measure of damages, should it ever be needed. If the present verdict is affirmed on defendants' appeal (as we believe it should be) then of course the alternative measure of damages is of no importance. In the event of an affirmance on defendants' appeal we want the cross-appeal dismissed.

B. Counsel misquote the sentence on page 26 of our opening brief: "were admissible as an alternative measure of damages (as was held on the first trial)". They leave out the parenthesis. It is perfectly true that on the first trial one measure of damages was based on market value. We discuss this phase on pages 32-3 of our cross-appellant's opening brief.

On page 24 counsel repeatedly charge us with "confusion". The real trouble would seem to be that counsel have not read our brief.

Thus they say that there is "confusion" in citing 55 *C. J.* 1161, because that deals with sales by the *buyer*. But in the paragraph immediately following the quotation (Cross-Appellant's Op. Br. p. 28) we note this fact, and explain its relevancy. Cross-appellees' brief would lead one to think that their counsel had never read this paragraph. That is what we do think.

In the same way counsel say we are "confused" in treating a *seller's profit* "as coinciding somehow with a *buyer's loss of profit*". (Br. p. 24.)

But we never spoke of the seller's *profit*. Confusion here is on the side of cross-appellees. Profit means net profit. Seller's *profit* would be the difference between the seller's *purchase* price and the seller's *resale* price. In this case it would be the difference between the price for which the *Bercuts originally acquired the wine*, and the prices for which they sold it. But the Bercuts' purchase price is not in evidence. No one has alluded to their net profit or based any argument upon it. The only thing which cross-appellant offered was the seller's *resale price*. *Its relevancy is that the resale price obtained by the seller is some evidence of the resale price which could have been obtained by the buyer*. We explained this in our opening brief, page 28 (last par.) and page 31. We also showed that the few cases on the subject support our position. (Cross-Appellant's Op. Br. pp. 29-30.)

C. Lastly counsel claim that damages should have been calculated as of the date of breach rather than the date of delivery.

1. They rely mainly on *Lompoc Produce etc. Co. v. Browne*, 41 Cal. App. 607, implying that this represents the law unchanged by the Sales Act.

But in the first place both earlier and later California cases are to the contrary even before the Sales Act. These were *Meyer v. Sullivan*, 40 Cal. App. 723, 732; *U. S. Trading Co. v. Newmark*, 56 Cal. App. 176, 191, and *Felice & Perrelli C. Co. Inc. v. Walton*, 95 Cal. App. 7, 11, all cited at page 33 of our opening brief.

In the second place, decisions under the Sales Act in other States have definitely adopted the rule that relevant price in anticipatory breach cases is the price *at the date of delivery*.

2. Counsel also contend that the date of breach would apply under C. C. 1787 because (as they say) no date of delivery was fixed. But the modification agreement of February 3 said: "the greatest diligence should be exercised by both parties in order to commence at least *60 days hence*." This fixes the approximate date.

In *Phillips Sheet & Tin Plate Co. v. W. W. Bayer & Co.*, 133 Md. 49, 105 Atl. 166, on which counsel rely, no date was fixed in advance at all. It was merely said "specifications: To be given at least 60 days *in advance* of shipping date'." But the shipping date itself was left to be fixed in the future. The present con-

tract provides for performance “at least (not more than?) 60 days *hence*”, i.e., *after the date of the instrument*—in short, at an ascertainable date.

Counsel close their brief with some philosophical observations on Prof. Williston’s reluctance to accept the doctrine of anticipatory breach. They require no comment.

V. CONCLUSION.

Cross-appellees’ brief has not weakened the points made in our opening brief.

Plaintiff’s position, as upheld on the first trial, was correct. If for any reason there should be a third trial, it should be had upon the basis outlined upon our cross-appeal.

But if the judgment be affirmed on defendants’ appeal (as we believe it should be) then we ask the cross-appeal to be dismissed.

Dated, San Francisco, California,
January 22, 1945.

Respectfully submitted,

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